(1)

No. 87-5367-CSY
Status: GRANTED
CAPITAL CASE

Title: Ralph Mills, Petitioner
v.
Maryland

Docketed:
August 18, 1987

Court: Court of Appeals of Maryland

Counsel for petitioner: Burns Jr.,George E.

Counsel for respondent: Rosenblatt,Richard B.

NOTE* CAPITAL CASE

Entry	Date	Note	Proceedings and Orders
1	Aug 18 1987	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Nov 5 1987		Brief of respondent Maryland in opposition filed.
4	Nov 12 1987		DISTRIBUTED. November 25, 1987
6	Nov 30 1987		REDISTRIBUTED. December 4, 1987
8	Dec 7 1987		Petition GRANTED.
			**********
9	Jan 14 1988		Brief of petitioner Ralph Mills filed.
10	Jan 21 1988		Brief amicus curiae of NAACP Legal Defense and Educational Fund, Inc. filed.
11	Jan 26 1988		Joint appendix filed.
12	Feb 5 1988		SET FOR ARGUMENT. Wednesday, March 30, 1988. (4th case).
13	Feb 16 1988		Record filed.
		*	Certified original record, 4 volumes, received.
14	Feb 17 1988		Brief of respondent Maryland filed.
15	Feb 23 1988		CIRCULATED.
16	Mar 30 1988		ARGUED.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

RALPH MILLS,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI

Alan H. Murrell
Public Defender of Maryland

George E. Burns, Jr.
Assistant Public Defender
Office of the Public Defender
Appellate Division
312 North Eutaw Street
Baltimore, Maryland 21201
(301) 333-4842

OF COUNSEL:

Michael R. Braudes
Assistant Public Defender

Counsel for Petitioner

QUESTIONS PRESENTED

1. May the Maryland Court of Appeals place a strained and unrealistic construction upon the Maryland death penalty statute in order to defeat a contention that the statute is unconstitutionally mandatory in its application?

2. Was the Maryland death penalty statute applied to Petitioner's case in an unconstitutionally mandatory manner?

3. Must Petitioner's sentence of death be vacated because of the admission of victim-impact evidence?

TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS	2
STATUTES	2
RULES	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	3
CONCLUSION	10
APPENDIX	Apx.1

TABLE OF AUTHORITIES

Cases

Ashton v. Kentucky, 384 U.S. 195 (1966)	7
Booth v. Maryland, ___ U.S. ___, (No. 86-5020, filed June 15, 1987)	9
Eddings v. Oklahoma, 455 U.S. 104 (1982)	4,5
Gardner v. Louisiana, 368 U.S. 157 (1961)	7
Gregg v. Georgia, 428 U.S. 153 (1976)	4
Lockett v. Ohio, 438 U.S. 586 (1978)	4,5
Mullaney v. Wilbur, 421 U.S. 684 (1975)	7
Ralph Mills v. State of Maryland, No. 22, September Term, 1985	1
Stebbing v. Maryland, 105 S.Ct. 276 (1984)	8
Sumner v. Shuman, ___ U.S. ___, 41 Crim. L. 3334 (1987)	4
Woodson v. North Carolina, 428 U.S. 280 (1976)	4

Constitution

United States Constitution,	
Amendment VIII	2
Amendment XIV	2

Statutes

Maryland Code, (1957, 1982 Repl. Vol.),
Article 27, § 413.....2,3
§ 414..... 2

Rule

Maryland Rule 4-343.....2,5

Misc. No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

RALPH MILLS,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI

Ralph Mills, Petitioner, requests that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland entered on June 25, 1987, in Ralph Mills v. State of Maryland, No. 22, September Term, 1985.

OPINION BELOW

The opinion of the Court of Appeals of Maryland, filed June 25, 1987, is reproduced at App. 16. This opinion is reported and published. Included are an opinion of the Court (per Eldridge, J.), a concurring opinion (per Murphy,

C.J.), and a dissenting opinion (per McAuliffe, J.).

JURISDICTION

The opinion of the Court of Appeals of Maryland was filed on June 25, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULE

The following are set forth in the Appendix:

CONSTITUTIONAL PROVISIONS

United States Constitution,
Amendments VIII and XIV

STATUTES

Maryland Code, (1957, 1982 Repl. Vol.), Article 27,
§§ 413 and 414.

RULE

Maryland Rule 4-343

STATEMENT OF THE CASE

Petitioner was convicted of murder by the Circuit Court for Allegany County, Maryland, and sentenced to death. The Court of Appeals of Maryland, on direct appeal, affirmed the judgment, with one Judge concurring in the result and one Judge dissenting.

It was undisputed at trial that Petitioner, while an inmate at the Maryland Correctional Institution at Hagerstown, stabbed to death his cell-mate, Paul Robin Brown, with a "home-made" knife. On the basis of this incident, a jury returned a conviction of murder in the

first degree. The prosecution timely notified Petitioner of its intention to seek the death penalty.

The Maryland death penalty statute, Md. Code (1957, 1982 Repl. Vol., 1986 Cum. Supp.) Art. 27, § 413, mandates that the sentencing authority (a jury in Petitioner's case) first unanimously determine whether certain enumerated aggravating factors exist, and if so to unanimously determine whether any mitigating factors exist. In the event that both aggravating and mitigating factors exist, the sentencing authority engages in a process of weighing and balancing to determine the ultimate sentence. Where on the other hand the sentencer finds that one or more aggravating factors exists, but that no mitigating factors exist, the sentence is automatically death. Art. 27, § 413(h)(2). In the present case, the jury returned the aggravating factor set forth in Art. 27, § 413(d)(2) - "The defendant committed the murder at a time when he was confined in any correctional institution." It did not unanimously find any mitigating factors.[1] The sentence was accordingly death.

REASONS FOR ISSUING THE WRIT

A. Mandatory application of the Maryland death penalty statute and the construction of that statute by the Maryland Court of Appeals.

The Maryland death penalty statute operated in an

---

[1]The evidence generated as possible mitigating factors Petitioner's youthful age at the time of the offense, his unfortunate childhood, and the failure of the government to provide meaningful treatment.

unconstitutionally mandatory fashion, because the finding of a single aggravating factor in the absence of any mitigating factor requires a sentence of death, without any weighing of circumstances and without excluding the possibility that some or all of the members of the jury did not believe that death was the appropriate sanction. As a necessary corollary, evidence in mitigation which could persuade some but not all of the jurors was effectively excluded from the sentencing process. The operation of the statute to impose a death sentence in this case violates the settled rules that a capital sentencing statute cannot constitutionally operate in a mandatory manner, or in such a way as to exclude from practical consideration evidence in mitigation. See Sumner v. Shuman, ___ U.S. ___, 41 Crim. L. 3334 (1987); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).

The Court of Appeals of Maryland, over a dissent and a concurring opinion which rejected its analysis, construed the statute in a way that, according to the Court of Appeals majority, defeated any contention that the statute operated in a mandatory fashion and excluded from consideration relevant mitigating evidence. The Court's construction has no basis in the language of the statute, in precedent, or in the jury instructions propounded in this case and in every other capital case in the State of Maryland. The statute as applied in this case is invalid,

and that a strained, artificial, and totally unsubstantiated "construction" by an appellate court does not suffice to save it.

In order to understand and assess the competing interpretations of the statute, it is necessary to understand that the sentencing jury fills out a "Findings and Sentencing Determination" form promulgated pursuant to Maryland Rule 4-343 and its predecessor, Rule 772A. See App. 8. Under this Rule, the jury is enjoined to mark "yes" any aggravating or mitigating factor which it unanimously finds has been established, and to mark "no" any aggravating or mitigating factor which "has not been so proved."

This language mandates a negative response to any mitigating factor which has not been unanimously agreed to by all of the 12 jurors. Thus, if six jurors believe that a mitigating factor has been established, but six do not, that mitigating factor is marked "no." Under these circumstances, the mitigating force of the evidence is totally excluded from the final calculus, thereby establishing a clear violation of Lockett and Eddings. Moreover, in the common situation where the defense relies upon more than one mitigating factor, it is entirely possible that each juror will be persuaded that at least one mitigating factor exists' that no juror will be convinced that the death penalty is appropriate; but that under the mechanical application of the Maryland statute the jury will be

compelled to return a death sentence. This flaw in the statute renders the entire scheme constitutionally invalid.

Under the approach taken by the Court of Appeals, the rejection as well as the acceptance of a mitigating factor requires unanimity, and a divided vote results in leaving the sentencing form blank with respect to the mitigating factor which gave rise to the division. Thus, a "no" does not mean that a juror convinced by mitigating evidence must put it out of his mind. For a number of reasons, this approach simply does not work. First, as the dissent points out it is an historical fact that sentencing forms are not left blank -- every mitigating factor on every form resulting in a death sentence in Maryland has received a "yes" or "no." As a matter of human experience, it is simply not possible that each of these determinations has resulted from a unanimous vote, and that there has never been a divided jury with respect to any mitigating factor. Secondly, the trial court's instructions did not permit the jury to resolve the matter in this way -- there is no hint that one available option was to leave the form partially blank. Again, attention is directed to the recitation of the jury instructions in the dissenting opinion. Finally, the sentencing form itself speaks in terms of a unanimous affirmative response, and does not by its terms require a unanimous negative response. In sum, it is entirely possible that the "no's" affixed to the mitigating factors disguise and destroy many decisions by individual jurors

that mitigating factors did, in fact, exist.

The Court of Appeals majority goes on to posit an individual weighing and balancing of aggravating and mitigating factors in the minds of individual jurors, who must consider whether under all of the facts and circumstances death is an appropriate sanction. While such a decisional process could conceivably occur under a statute, sentencing form, and jury instructions that provide for it, the Maryland statute and rules, and the instructions actually propounded to the jury that sentenced Petitioner to die, do not provide such a decisional process.

Although it is generally the province of the state courts to "interpret, and where they see fit, to reinterpret their own constitutions and statutes, Gardner v. Louisiana, 368 U.S. 157, 169 (1961), limitations are imposed on judicial reconstruction by considerations of due process. A court may not use its interpretive authority as a "'obvious subterfuge to evade consideration of a federal issue.'" Mullaney v. Wilbur, 421 U.S. 684, 696 n. 11 (1975). Moreover, the retroactive application of a novel construction of the statute, which could not have been anticipated, raises serious questions of due process. As this Court wrote in Ashton v. Kentucky, 384 U.S. 195, 198 (1966), "Where an accused is tried under a broad construction of an Act which would make it unconstitutional, the conviction cannot be sustained on appeal by a limiting construction which eliminates the unconstitutional features

of the Act...."

As Justice Marshall has recognized in dissenting from denial of certiorari in an earlier case, the Maryland Court of Appeals has used its interpretive authority before to avoid a substantial federal issue by construing language in the death penalty statute in a manner totally at odds with the plain meaning of the words used. Stebbing v. Maryland, 105 S.Ct. 276 (1984). Just as the Maryland Court in Stebbing and related cases construed language which allocated the burden of proof to the defense to mean that the burden is on the government, so the same Court here has construed language which effectively buries probative evidence of mitigation to mean that individual jurors can and must, on an individual basis, give full consideration to anything in the case that they find mitigating. In reality, it is a safe assumption that no Maryland judge propounding instructions and no Maryland juror deliberating a defendant's fate has ever understood the process to work this way.

B. Victim Impact Statement.

The following victim impact statement, summarizing an interview with Paul Robin Brown's brother and sister-in-law, was introduced in evidence:

> "Paul and Thomas Brown came from a family of six. At a very young age they were removed from their parents custody because of neglect and placed in separate foster homes. (Removal by the Department of Social Services was prompted by Paul being hospitalized at age 4 for anemia and

malnutrition.)

> "Paul was a hyperactive child and hard to handle which resulted in a lot of beatings from his various guardians. He ran away constantly from the various homes in which he had been placed. After a while Paul, at the age of 15, just started living on the streets. He was eventually sent to the Maryland Training School for Boys. Paul never really had a home or a family as such. 'I (Thomas Brown) tried to keep in touch with Paul by writing and visiting him whenever possible. I always had good homes and a good life and always felt so guilty that there was nothing I could do to help Paul. After all, I was only one year older than he.'
>
> "'Paul was a good person who had a tough life, a lot of bad breaks, no family, no home, nobody to really give him a chance. I sometimes think he felt more secure in prison, because he had no one on the outside. Sure, he committed crimes, but he wasn't violent. He did what he had to do to survive and he got involved with a lot of bad people."

The Maryland Court of Appeals held that this did not constitute proscribed victim impact evidence under Booth v. Maryland, ___ U.S. ___, (No. 86-5020, filed June 15, 1987), reasoning that the document does not describe the impact of the offense upon the victim's family. (Slip op. at 50, n. 14.)

This reasoning construes Booth too narrowly. This Court made clear in Booth that victim impact evidence can improperly focus the sentencer's attention not only upon the victim's family, but also upon "the character and reputation of the victim." Slip op. at 8. The Court went on to write that the issue of whether the victim's character was

"sterling" or "questionable" is not a proper consideration in selecting those few defendants who deserve to die. (Id. at 9.) Accordingly, evidence tending to show that Paul Brown was a sympathetic individual was equally inadmissible as evidence that his relatives were deeply affected by his death would have been.

For this reason as well, the judgment must be reviewed and reversed.

Respectfully submitted,

Alan H. Murrell
Public Defender

George E. Burns, Jr.
Assistant Public Defender
Appellate Division
Second Floor
312 North Eutaw Street
Baltimore, Maryland 21201
(301) 333-4842

Of Counsel:

Michael R. Braudes
Assistant Public Defender
Appellate Division
Second Floor
312 North Eutaw Street
Baltimore, Maryland 21201
(301) 333-4869

Counsel for Petitioner

lv
8/12/87

APPENDIX

A P P E N D I X

Maryland Code (1957, 1982 Repl. Vol.) Art. 27, Secs. 413-414 provide:

Section 413. Sentencing procedure upon finding of guilty of first degree murder.

(a) Separate sentencing proceeding required. -- If a person is found guilty of murder in the first degree, and if the State had given the notice required under Sec. 412(b), a separate sentencing proceeding shall be conducted as soon as practicable after the trial has been completed to determine whether he shall be sentenced to death or imprisonment for life.

(b) Before whom proceeding conducted. --This proceeding shall be conducted:

(1) Before the jury that determined the defendant's guilt; or

(2) Before a jury impaneled for the purpose of the proceeding if:

(i) The defendant was convicted upon a plea of guilty;

(ii) The defendant was convicted after a trial before the court sitting without a jury;

(iii) The jury that determined the defendant's guilt has been discharged by the court for good cause; or

(iv) Review of the original sentence of death by a court of competent jurisdiction has resulted in a remand for resentencing; or

(3) Before the court alone, if a jury sentencing proceeding is waived by the defendant.

(c) Evidence; argument; instructions. -- (1) The following type of evidence is admissible in this proceeding:

(i) Evidence relating to any mitigating circumstance listed in subsection (g) of this section;

(ii) Evidence relating to any aggravating circumstance listed in subsection (d) of this section of which the State had notified the defendant pursuant to Section 412(b);

(iii) Evidence of any prior criminal convictions, pleas of guilty or nolo contendere, or the absence of such prior convictions or pleas, to the same extent admissible in other sentencing procedures;

(iv) Any presentence investigation report. However, any recommendation as to sentence contained in the report is not admissible; and

(v) Any other evidence that the court deems of probative value and relevant to sentence, provided the defendant is accorded a fair opportunity to rebut any statements.

(2) The State and the defendant or his counsel may present argument for or against the sentence of death.

(3) After presentation of the evidence in a proceeding before a jury, in addition to any other appropriate instructions permitted by law, the court shall instruct the jury as to the findings it must make in order to determine whether the sentence shall be death or imprisonment for life and the burden of proof applicable to these findings in accordance with subsection (f) or subsection of (h) of this section.

(d) Consideration of aggravating circumstances. -- In determining the sentence, the court or jury, as the case may be, shall first consider whether, beyond a reasonable doubt, any of the following aggravating circumstances exist:

(1) The victim was a law enforcement officer who was murdered while in the performance of his duties.

(2) The defendant committed the murder at a time when he was confined in any correctional institution.

(3) The defendant committed the murder in furtherance of an escape or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.

(4) The victim was taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.

(5) The victim was a child abducted in violation of § 2 of this article.

(6) The defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder.

(7) The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

(8) At the time of the murder, the defendant was under sentence of death or imprisonment for life.

(9) The defendant committed more than one offense of murder in the first degree arising out of the same incident.

(10) The defendant committed the murder while committing or attempting to commit a robbery, arson, rape, or sexual offense in the first degree.

(e) Definitions. -- As used in this section, the following terms have the meanings indicated unless a contrary meaning is clearly intended from the context in which the term appears:

(1) The terms "defendant" and "person", except as those terms appear in subsection (d)(7), include only a principal in the first degree.

(2) The term "correctional institution" includes any institution for the detention or confinement of persons charged with or convicted of a crime, including Patuxent Institution, any institution for the detention or confinement of juveniles charged with or adjudicated as being delinquent, and any hospital in which the person was confined pursuant to an order of a court exercising criminal jurisdiction.

(3) The term "law enforcement officer" has the meaning given in § 727 of Article 27. However, as used in subsection (d), the term also includes (i) an officer serving in a probationary

status, (ii) a parole and probation officer, and (iii) a law enforcement officer of a jurisdiction outside of Maryland.

(f) Finding that no aggravating circumstances exist. -- If the court or jury does not find, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall state that conclusion in writing, and the sentence shall be imprisonment for life.

(g) Consideration of mitigating circumstances. -- If the court or jury finds, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall then consider whether, based upon a preponderance of the evidence, any of the following mitigating circumstances exist:

(1) The defendant has not previously (i) been found guilty of a crime of violence, (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) had a judgment of probation on stay of entry of judgment entered on a charge of a crime of violence. As used in this paragraph, "crime of violence" means abduction, arson, escape, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery, or rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.

(2) The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

(3) The defendant acted under substantial duress, domination or provocation of another person, but no so substantial as to constitute a complete defense to the prosecution.

(4) The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, or emotional disturbance.

(5) The youthful age of the defendant at the time of the crime.

(6) The act of the defendant was not the sole proximate cause of the victim's death.

(7) It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

(8) Any other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case.

(h) Weighing mitigating and aggravating circumstances. -- (1) If the court or jury finds that one or more of these mitigating circumstances exist, it shall determine whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances.

(2) If it finds that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death.

(3) If it finds that the mitigating circumstances outweigh the aggravating circumstances, the sentence shall be imprisonment for life.

(i) Determination to be written and unanimous. -- The determination of the court or jury shall be in writing, and, if a jury, shall be unanimous and shall be signed by the foreman.

(j) Statements required in determination. -- The determination of the court of jury shall state, specifically:

(1) Which, if any, aggravating circumstances it finds to exist;

(2) Which, if any, mitigating circumstances it finds to exist;

(3) Whether any mitigating circumstances found under subsection (g) outweigh the aggravating circumstances found under subsection (d);

(4) Whether the aggravating circumstances found under subsection (d) are not outweighed by mitigating circumstances found under subsection (g); and

(5) The sentence, determined in accordance with subsection (f) or (h).

(k) Imposition of sentence. -- (1) The court shall impose the sentence determined by the jury under subsection (f) or (h).

(2) If the jury, within a reasonable time is not able to agree as to sentence, the court shall dismiss the jury and impose a sentence of imprisonment for life.

(3) If the sentencing proceeding is conducted before a court without a jury, the court shall impose the sentence determined under subsection (f) or (h).

(l) Rules of procedure. -- The Court of Appeals may adopt rules of procedure to govern the conduct of a sentencing proceeding conducted pursuant to this section, including any forms to be used by the court or jury in making its written findings and determinations of sentence. (1978, ch. 3, §§ 1,2; 1979, ch. 521.)

Section 414. Automatic review of death sentences.

(a) Review by Court of Appeals required. -- Whenever the death penalty is imposed, and the judgment becomes final, the Court of Appeals shall review the sentence on the record.

(b) Transmission of papers to Court of Appeals. -- The clerk of the trial court shall transmit to the Clerk of the Court of Appeals the entire record and transcript of the sentencing proceeding within ten days after receipt of the transcript by the trial court. The clerk also shall transmit the written findings and determination of the court or jury and a report prepared by the trial court. The report shall be in the form of a standard questionnaire prepared and supplied by the Court of Appeals of Maryland and shall include a recommendation by the trial court as to whether or not imposition of the sentence of death is justified in the case.

(c) Briefs and oral argument. -- Both the State and the defendant may submit briefs and present oral argument within the time provided by the Court.

(d) Consolidation of appeals. -- Any appeal from the verdict shall be consolidated in the Court of Appeals with the review of sentence.

(e) Considerations by Court of Appeals. --In addition to the consideration of any errors properly before the Court on appeal, the Court of Appeals shall consider the imposition of the death sentence. With regard to the sentence, the Court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) Whether the evidence supports the jury's or court's finding of a statutory aggravating circumstance under § 413 (d);

(3) Whether the evidence supports the jury's or court's finding that the aggravating circumstances are not outweighed by mitigating circumstances; and

(4) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(f) Decision of Court of Appeals. -- (1) In addition to its review pursuant to any direct appeal, with regard to the death sentence, the Court shall:

(i) Affirm the sentence;

(ii) Set aside the sentence and remand the case for the conduct of a new sentencing proceeding under § 413; or

(iii) Set aside the sentence and remand for modification of the sentence to imprisonment for life.

(2) The Court shall include in its decision a reference to the similar cases which it considered.

(g) Rules of procedure. -- The Court may adopt rules of procedure to provide for the expedited review of all death sentences pursuant to this section. (1978, ch. 3, §§ 1,2.)

RULES INVOLVED

Maryland Rules of Procedure, Rule 4-343:

Rule 4-343. Sentencing -- Procedure In Capital Cases.

(a) Applicability. -- This Rule applies whenever sentence is imposed under Code, Article 27, Sec. 413.

(b) Statutory Sentencing Procedure. -- When a defendant has been found guilty of murder in the first degree and the State has given the notice required under Code, Article 27, Sec. 412(b), a separate sentencing proceeding shall be conducted as soon as practicable after the trial pursuant to the provisions of Code, Article 27, § 413.

(c) Judge. -- Except as provided in Rule 4-361, the judge who presides at trial shall preside at the sentencing proceeding.

(d) Allocution. -- Before sentence is determined, the court shall afford the defendant the opportunity, personally and through counsel, to make a statement.

(CAPTION)

FINDINGS AND SENTENCING DETERMINATION

Section I

Based upon the evidence, we unanimously find that each of the following aggravating circumstances that is marked "yes" has been proven BEYOND A REASONABLE DOUBT. Each of the aggravating circumstances that has not been so proven is marked "no."

1. The victim was a law enforcement officer who was murdered while in the performance of the officer's duties.

Yes No

2. The defendant committed the murder at a time when confined in a correctional institution.

Yes No

3. The defendant committed the murder in furtherance of an escape from or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.

Yes No

4. The victim was taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.

Yes No

5. The victim was a child abducted in violation of Code, Article 27, Sec. 2.

Yes No

6. The defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder.

Yes No

7. The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

Yes No

8. At the time of the murder, the defendant was under the sentence of death or imprisonment for life.

Yes No

9. The defendant committed more than one offense of murder in the first degree arising out of the same incident.

Yes No

10. The defendant committed the murder while committing or attempting to commit robbery, arson, rape in the first degree or sexual offense in the first degree.

Yes No

(If one or more of the above are marked "yes," complete Section II. If all of the above are marked "no," do not complete Sections II and III.)

Section II

Based upon the evidence, we unanimously find that each of the following mitigating circumstances that is marked "yes" has been proven to exist by A PREPONDERANCE OF THE EVIDENCE. Each mitigating circumstances that has not been so proved is marked "no."

1. As used in this paragraph, "crime of violence" means abduction, arson, escape, kidnapping, mayhem, murder, robbery, rape in the first or second degree, sexual offense in the first or second degree, manslaughter other than involuntary manslaughter, an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.

The defendant previously (i) has not been found guilty of a crime of violence; and (ii) has not entered a plea of guilty or nolo contendere to a charge of a crime of violence; and (iii) has not been granted probation on stay of entry of judgment pursuant to a charge of a crime of violence.

Yes No

2. The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

Yes No

3. The defendant acted under substantial duress, domination, or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution.

Yes No

4. The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, or emotional disturbance.

Yes No

5. The defendant was of a youthful age at the time of the crime.

Yes No

6. The act of the defendant was not the sole proximate cause of the victim's death.

Yes No

7. It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

Yes No

8. Other facts specifically set forth below constitute mitigating circumstances:

Yes No

_____
_____
_____
_____
(Use reverse side if necessary)

(If one or more of the above in Section II have been marked "yes," complete Section III. If all of the above in Section II are marked "no," do not complete Section III.)

Section III

Based on the evidence, we unanimously find that it has been proven by A PREPONDERANCE OF THE EVIDENCE that the mitigating circumstances marked "yes" in Section II outweigh the aggravating circumstances marked "yes" in Section I.

Yes No

DETERMINATION OF SENTENCE

Enter the determination of sentence either "Life Imprisonment" or "Death" according to the following instructions:

1. If all of the answers in Section I are marked "no," enter Life Imprisonment."

2. If Section III was completed and was marked "yes," enter "Life Imprisonment."

3. If Section II was completed and all of the answers were marked "no," then enter "Death."

4. If Section III was completed and was marked "no," enter "Death."

We unanimously determine the sentence to be_____

_____ Foreman	_____ Juror 7
_____ Juror 2	_____ Juror 8
_____ Juror 3	_____ Juror 9
_____ Juror 4	_____ Juror 10
_____ Juror 5	_____ Juror 11
_____ Juror 6	_____ Juror 12

or, _____ JUDGE

(f) Advice of the Judge. -- At the time of imposing sentence, the judge shall advise the defendant of the right of appeal and the time allowed for the exercise of this right. The judge shall also advise a defendant who receives a sentence of death that (1) the sentence only will be reviewed automatically by the Court of Appeals, and (2) the sentence will be stayed pending review of the sentence by the Court of Appeals and any appeal which the defendant may take.

(g) Report of Judge. -- After sentence is imposed, the judge promptly shall prepare and send to the parties a report in the following form:

(CAPTION)

REPORT OF TRIAL JUDGE

I. Data Concerning Defendant

A. Date of Birth
B. Sex
C. Race
D. Address
E. Length of Time in Community
F. Reputation in Community
G. Family Situation and Background
   1. Situation at time of offense (describe defendant's living situation including marital status and number and age of children)
   2. Family history (describe family history including pertinent data about parents and siblings
H. Education
I. Work Record
J. Prior Criminal Record and Institutional History (list any prior convictions, disposition, and periods of incarceration)
K. Military History
L. Pertinent Physical or Mental Characteristics or History
M. Other Significant Data About Defendant

II. Data Concerning Offense

A. Briefly describe facts of offense (include time, place, and manner of death; weapon, if any; other participants and nature of participation)
B. Was there any evidence that the defendant was under the influence of alcohol or drugs at the time of the offense? If so describe.
C. Did the defendant know the victim prior to the offense?
   Yes_____ No_____
   1. If so, describe relationship.
   2. Did the prior relationship in any way precipitate the offense? If so, explain.
D. Did the victim's behavior in any way provoke the offense? If so, explain.
E. Data Concerning Victim
   1. Name
   2. Date of Birth
   3. Sex
   4. Race

   5. Length of time in community
   6. Reputation in community
F. Any Other Significant Data About Offense

III. A. Plea Entered by Defendant:
Not guilty____; guilty____; not guilty by reason of insanity ____
B. Mode of Trial:
Court_____ Jury_____
If there was a jury trial, did defendant challenge the jury selection or composition? If so, explain.
C. Counsel
   1. Name
   2. Address
   3. Appointed or retained
   (If more than one attorney represented defendant, provide data on each and include stage of proceeding at which the representation was furnished.)
D. Pre-Trial Publicity -- Did defendant request a mistrial or a change of venue on the basis of publicity? If so, explain. Attach copies of any motions made and exhibits filed.
E. Was defendant charged with other offenses arising about of the same incident? If so, list charges; state whether they were tried at same proceeding, and give disposition.

IV. Data Concerning Sentencing Proceeding

A. List aggravating circumstance(s) upon which State relied in the pretrial notice.
B. Was the proceeding conducted
before same judge as trial? _____
before same jury? _____
If the sentencing proceeding was conducted before a jury other than the trial jury, did the defendant challenge the selection or composition of the jury? If so, explain.
C. Counsel -- If counsel at sentencing was different from trial counsel, give information requested in III C above.
D. Which aggravating and mitigating circumstances were raised by the evidence?
E. On which aggravating and mitigating circumstances were the jury instructed?
F. Sentence imposed: Life imprisonment
Death

V. Chronology
Date of Offense
Arrest
Charge

Notification of intention to seek penalty of death
Trial (guilt/innocence) -- began and ended
Post-trial Motions Disposed Of
Sentencing Proceeding -- began and ended
Sentence Imposed

VI. Recommendation of Trial Court As To Whether Imposition of Sentence of Death is Justified.

VII. A copy of the Findings and Sentencing Determination made in this action is attached to and made a part of this report.

_____
Judge

CERTIFICATION

I certify that on the _____ of _____, 19____ I sent copies of this report to counsel for the parties for comment and have attached any comments made by them to this report.

_____
Judge

Within five days after receipt of the report, the parties may submit to the judge written comments concerning the factual accuracy of the report. The judge promptly shall file with the clerk of the trial court, and in the case of a life sentence with the Clerk of the Court of Appeals the report in final form, noting any changes made, together with any comments of the parties.

IN THE COURT OF APPEALS OF MARYLAND

Nos. 22 and 79

September Term, 1985

RALPH WILLIAM MILLS

v.

STATE OF MARYLAND

Murphy, C.J.
*Smith
Eldridge
Cole
Rodowsky
*Couch
McAuliffe,
JJ.

Opinion by Eldridge, J.
Murphy, C.J., concurs in the Judgment.
McAuliffe, J., concurs and dissents.

Filed: June 25, 1987

*Smith, J., and Couch, J., now retired, participated in the hearing and conference of this case while active members of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, they also participated in the decision and adoption of this opinion.

16

In March 1985 Ralph William Mills was tried for first degree murder before a jury in the Circuit Court for Allegany County. His appeal challenges the resulting conviction and death sentence. We shall affirm.

The parties have agreed pursuant to Maryland Rule 828(g) that the following facts are relevant to the disposition of this appeal. Mills shared cell number 20 on "G-One" tier at the Maryland Correctional Institution in Hagerstown with Paul Robin Brown. At 10:47 p.m. on August 6, 1984, correctional officers were called to the cell to investigate a disturbance. When the officers arrived, Mills demanded to be released from his cell, saying, "my cell buddy is dead." The cell door was opened and Mills emerged, carrying a blood-covered "shank," or home-made knife, at his side. Mills stated several times that he had "killed his cell buddy." Brown's body was found lying on his bunk, stabbed six times in the chest and thirty-nine times in the back.

About three weeks before this homicide, Mills had written to the warden, threatening to kill his cell mate (who at that time was not Paul Robin Brown) if certain complaints, primarily concerning visitation, were not satisfactorily

resolved. At the trial another inmate, David Gallahan, testified for the defense that Brown had lent him the murder weapon prior to the homicide, and had asked for and received it back on the day of the incident.

Mills presents us with numerous questions for review, some relating to the guilty verdict and some relating just to the sentence of death.

I.

The first two questions presented concern the denial of Mills's motions to strike two prospective jurors for cause. Mills's counsel conceded in this Court that Mills had exercised only sixteen of his allotted twenty peremptory challenges.[1] Neither of the prospective jurors whom Mills moved to strike for cause was impanelled to serve as a juror or to serve as an alternate.

Assuming for purposes of argument that the trial judge should have dismissed the two veniremen for cause, it is difficult to understand how his failure to do so could have prejudiced Mills when the defendant's peremptory challenges

---

[1] Maryland Rule 4-313(a) provides that defendants in cases such as this are permitted twenty peremptory challenges plus two additional peremptory challenges for each alternate juror.

were not exhausted and the two veniremen were not seated. We have previously stated that when an accused has not exhausted his peremptory strikes, failure to disqualify a prospective juror for cause is not reversible error. *White v. State*, 300 Md. 719, 728, 481 A.2d 201 (1984), *cert. denied*, 470 U.S. 1062, 105 S.Ct. 1779, 84 L.Ed.2d 837 (1985). *See Booth v. State*, 306 Md. 172, 185, 507 A.2d 1098 (1986), *vacated on other grounds*, U.S. , S.Ct. , L.Ed.2d (1987).

We have also repeatedly held that a claim of error in the inclusion or exclusion of a prospective juror is ordinarily abandoned when the defendant or his counsel indicates satisfaction with the jury at the conclusion of the jury selection process. *Booth v. State*, *supra*, 306 Md. at 185; *Foster v. State*, 304 Md. 439, 450-451, 499 A.2d 1236 (1985), *cert. denied*, U.S. , 106 S.Ct. 3310, 92 L.Ed.2d 723 (1986); *Thomas v. State*, 301 Md. 294, 310, 483 A.2d 6 (1984), *cert. denied*, U.S. , 105 S.Ct. 1856, 85 L.Ed.2d 153 (1985); *White v. State*, *supra*, 300 Md. at 729, 731; *Calhoun v. State*, 297 Md. 563, 579-580, 468 A.2d 45, 52 (1983); *cert. denied*, 466 U.S. 993, 104 S.Ct. 2374, 80 L.Ed.2d 846 (1984). In this case, after the voir dire and peremptory strikes, the defense was asked if the jury panel was acceptable to the defendant. After checking the identity of one juror, defense counsel stated: "Your Honor, the Jury as impaneled is acceptable to the Defense." Under these circumstances it would be idle for us to consider whether or not the trial court should have struck the two veniremen for cause.

II.

Mills contends that the trial court should not have admitted into evidence two color photographs of the victim, showing his stab wounds and blood.

At trial this issue developed as follows. The first photograph admitted into evidence (State's Exhibit 3) was a color photograph of the prison cell wall above the victim's bunk. The photograph depicts three words fingerpainted in blood as well as a portion of the victim's body. Counsel for the defendant objected that the photograph "[s]hows some bias being a color photograph like it is," and argued that the State should produce a black and white photograph. The trial judge asked: "You concede that the fact that it's color doesn't automatically exclude it?" Counsel for the defendant responded, "I agree." The judge then ruled that if the State could establish that the colors were accurate, the photograph would be admitted into evidence, and afterwards it was so admitted.

The next photographs in evidence (State's Exhibits Nos. 5, 6, 7, 8, 9, 10) were admitted one after another, and resembled the first photograph in size, and coloration. Exhibit 5 depicted the feet of the victim, in socks; no blood was apparent. There was no objection to Exhibit 5 from defense counsel. Exhibit 6 showed the toilet in Mills's cell

as it appeared when the homicide was first investigated, with red stained pieces of white cloth or paper visible in the toilet bowl. Defense counsel objected to Exhibit 6. Exhibit 7 showed a corner of the cell, including the window, a cabinet, some clothes drying from a string, and the hand of the victim. No objection was made to the admission of this photograph. Exhibit 8 showed the back of the victim with blood draining from stabbings scattered from the shoulders to the waist level. Defense counsel objected to the admission of Exhibit 8. Exhibit 9 showed the face and chest of the victim, with blood draining from wounds, and there was no objection to this photograph. Exhibit 10 showed the victim lying face up on his bunk and showed part of the wall containing three words fingerpainted in blood. Blood could be seen, but not specific wounds. There was no objection with respect to Exhibit 10.

The trial court admitted Exhibits 5, 7, 9 and 10 into evidence, there being no objection to them. The court postponed consideration of Exhibits 6 and 8, which were objected to, until after the completion of the testimony of the witness who identified and vouched for the accuracy of all six photographs. With the jury excused from the courtroom, the court turned to the two challenged photographs. Mills moved to exclude the photograph of the toilet (Exhibit 6) and the photograph of the victim's back (Exhibit 8), arguing that the photographs would needlessly prejudice the jury, as the pictures

reflected facts which were not disputed and which, it was claimed, could have been easily established by testimony and less vivid photographs.

The State pointed to testimony that all of the photographs were fair and accurate. With respect to the picture of the toilet, the State contended that it would not "unduly inflame" the jurors and that its probative value outweighed its prejudicial value. As to the picture of the victim's back wounds, the State argued that it "completes the picture" by showing to the jury wounds not visible in the previously admitted pictures of the victim lying face up, and that it was the only photograph of the back wounds.

The trial judge admitted the challenged photographs, ruling as follows:

> "Well, the purpose of the . . . introduction of photographic evidence is to enable the side which offers it to offer probat ve evidence to the triers of fact, to the jurors. I know of no rule of evidence that requires me to guard the sensibilities of jurors whether we know what they are or not. I think the issue is whether or not that photograph would tend to inflame the jurors to in any way provide an exhibit or a bit of evidence in a sensational way. I think if the State sought to introduce eight photographs taken from slightly different angles, or to a series of photographs one of each area where there's a wound, then yes I think it would be potentially inflammatory. But to offer one single photograph of the . . . [victim] as he was found, be it in color or black and white, I don't think is unduly prejudicial and designed to inflame, and I don't think it will inflame.

"I'll overrule the objection and permit all the exhibits to come in."

On appeal, Mills contends: "Over objection, the trial court admitted State's Exhibits Eight and Nine." (Brief, p. 12). The actual objection was, "We would object to the No. 8 [the back wounds], Your Honor, along with No. 6 [the toilet bowl]. As to the others we have no objection." Accordingly, the present contention of error in the admission of the State's Exhibit 9, showing the face and chest of the victim, was clearly waived. *See* Rule 4-322. Moreover, even if No. 9 had been objected to, it is much less bloody and had much less potential for prejudice than No. 8. As we shall conclude that the admission of No. 8 furnishes no ground for reversal, the same conclusion is applicable to the admission of No. 9.

Mills and the State agree that the admissibility of photographs turns upon a balancing of their probative value against their potential for prejudice, and that the application of this test is a matter committed to the discretion of the trial judge. *See, e.g., State v. Tichnell*, 306 Md. 428, 463, 509 A.2d 1179 (1986); *Grandison v. State*, 305 Md. 685, 729, 506 A.2d 580, *cert. denied*, U.S. , 107 S.Ct. 38, 93 L.Ed.2d 174 (1986); *Ball v. State*, 305 Md. 9, 20, 501 A.2d 436 (1985); *Johnson v. State*, 303 Md. 487, 502-504, 495 A.2d 1 (1985), *cert. denied*, U.S. , 106 S.Ct. 868, 88 L.Ed.2d 907 (1986), and cases there cited. The standard was set forth in *Johnson v. State*, *supra*, where this Court found no error in the admission of a color photograph and black and white photographs of a homicide victim. We there stated as follows (303 Md. at 502):

"We have consistently held that whether or not a photograph is of practical value in a case and admissible at trial is a matter best left to the sound discretion of the trial judge. *Bowers v. State*, 298 Md. 115, 135-36, 468 A.2d 101, 111-12 (1983), quoting *Cook v. State*, 225 Md. 603, 608, 171 A.2d 460, 463 (1961), *cert. denied*, 368 U.S. 970, 82 S.Ct. 445, 7 L.Ed.2d 398 (1962). A court's determination in this area will not be disturbed unless plainly arbitrary. *Id.* Under this standard, we have permitted the reception into evidence of photographs depicting the condition of the victim and the location of injuries upon the deceased, *Clarke v. State*, 238 Md. 11, 21-22, 207 A.2d 456, 461-62 (1965); the position of the victim's body at the murder site, *Bribe v. State*, 264 Md. 352, 368-69, 286 A.2d 132, 140 (1972); and the wounds of the victim, *Madison v. State*, 200 Md. 1, 7-8, 87 A.2d 593, 595 (1952). On certain occasions, photographs have also been admitted to allow the jury to visualize the atrociousness of the crime - a circumstance of much import where the factfinder must determine the degree of murder. *See Fuller v. State*, 45 Md.App. 414, 420-21, 413 A.2d 277, 280-81 (1980).

* * *

We have previously held that photographs of the deceased are admissible even where the location of injuries was previously described and conceded by the defendant. *Smith v. State*, 182 Md. 176, 187, 32 A.2d 863, 867 (1943); *Snowden v. State*, 133 Md. 624, 631, 106 A. 5, 8 (1919). The Court reasoned that since the photographs were mere representations of what was already in evidence, their introduction could not be held to have injured the accused. *Smith*, 182 Md. at 187, 32 A.2d at 867."

Mills contends that "the more shocking the photo, the more important must be its contribution to the case in order for admission to be justified." (Brief, p. 13). He

argues that Exhibit 8 added nothing of substance to the State's case, because the medical examiner and other witnesses testified as to the stabbings and because this testimony was never controverted. The State responds that any prejudice caused by the photograph was justified by its probative value on the issues of premeditation and provocation.

We are unable to conclude that Exhibit 8 was likely to so distort the jury's deliberations that its admission was "plainly arbitrary," *Johnson, supra*, 303 Md. at 502. When the State sought to admit the photograph, no stipulation had been offered that the victim had been stabbed six times in the chest and thirty-nine times in the back. Mills does not contend that the photograph in any way misrepresented facts. We have examined Exhibit No. 8 and do not find it particularly gory or gruesome. Compare the photograph at issue in *Smith v. State*, 182 Md. 176, 187, 32 A.2d 863, 867 (1943) (upholding the admission of a photograph showing the victim's body partially exhumed one week after fatal axe blows to the head, even though the facts represented were already in evidence without objection and were not disputed).

In this Court, Mills also contends that the trial judge should not have allowed Exhibits 8 and 9 to be reintroduced in evidence at the sentencing proceeding. Before the jury was returned for this phase of the trial, the State announced that it would move to reintroduce all trial testimony and exhibits.

Counsel for defendant made sure that two exhibits marked for identification but not introduced would be kept from the jury, but, when asked by the court if he had any objection to the reintroduction of the trial exhibits and documents, counsel replied: "No, Your Honor." Mills has obviously waived the point. Rule 4-322(a).

III.

Next, Mills argues that the trial court erred in excluding evidence of the victim's character and reputation.

As we recently pointed out in *Mack v. State*, 300 Md. 583, 603-604, 479 A.2d 1344 (1985), whether the exclusion of evidence constituted reversible error is ordinarily not preserved for review "unless there has been a formal proffer of what the contents and relevance of the excluded testimony would have been." *See Feregoy v. Western Md. R. R. Co.*, 202 Md. 203, 209, 95 A.2d 867 (1953). The record shows that no such proffer was made in this case.

Conceding the absence of a proffer, Mills surmises on appeal that trial counsel made "an apparent effort to establish that Brown was the aggressor in the altercation with appellant" and "sought to elicit evidence that Brown had both assaultive and homosexual tendencies" of the sort that "could well have led the jury to believe that appellant's act was not premeditated

and unprovoked." (Brief, pp. 15, 17, 18). Even now, however, Mills does not contend that any of the witnesses would have testified that Mills struck at Brown in self defense or retaliation because of homosexual advances. We are left with appellate counsel's mere speculation in his brief that "some aspect of the victim's character and personality led to his demise." (Id., p. 20).[2] Something more than this type of vague speculation is required before we can conclude that the trial judge erred in excluding the evidence.

The principle that ordinarily the record must contain a "proffer to show precisely what the testimony, if admitted, would have established," does have an exception "where the tenor of the questions and the replies they were designed to elicit is clear," *Peregoy v. Western Md. R. R. Co.*, *supra*, 202 Md. at 209. In the instant case, it is far from clear that anything relevant might have been established by defense counsel's questions at trial concerning the victim's character.

Moreover, appellate counsel's speculation in this Court that the homicide might have been in self defense or in retaliation for a homosexual advance, in addition to not being

---

2 With regard to the evidentiary foundation which must be laid before evidence of a victim's character is admissible to support a claim of self defense, *see* Thomas v. State, 301 Md. 294, 306-307, 483 A.2d 6 (1984), *cert. denied*, ___ U.S. ___, 105 S.Ct. 1856, 85 L.Ed.2d 153 (1985).

reflected in a proffer or the tenor of the questions, is squarely contrary to all of the evidence. Before the killing Mills wrote to the Warden threatening to kill his cell mate if his visitation privileges were curtailed. Some weeks later Mills took his cell mate's "shank," put on a glove to improve his grip, and stabbed the cell mate forty-five times on his chest and back as he lay on his bunk. The cell showed no sign of any struggle. Before being let out of the cell, Mills fingerpainted the words "Helter Skelter's Son" in blood on the cell wall. On being let out, Mills told the guards that he killed his cell mate. In the absence of a proffer, it would appear beyond doubt that Paul Brown's character was irrelevant and that testimony on this subject was properly excluded.

IV.

The defendant Mills also argues that the trial judge erred in sustaining objections to certain questions which defense counsel asked the witness James Mills, who was the defendant's uncle and was a fellow inmate. The record on this point reads as follows:

> "Q Well first before I get into that let me ask you something else. You indicated that you saw Mr. Mills on the tier on an almost daily basis?
>
> "A Yes.

"Q How would you characterize his conduct in the institution?

"PROSECUTING ATTORNEY: Objection.

"BY THE COURT: Objection sustained.

"Q During the time that you were on G cell with Mr. Mills, do you know whether or not he had any trouble with the guards or other inmates?

"PROSECUTING ATTORNEY: Objection.

"A None at all.

"BY THE COURT: Just a minute, Mr. Mills. When you hear an objection, please don't answer the question.

"Objection sustained.

"Q Did you ever personally see any altercation with Ralph Mills between Ralph Mills and any of the guards?

"PROSECUTING ATTORNEY: Objection.

"BY THE COURT: Objection sustained.

"Q Did you ever personally see any altercation between Ralph Mills and any of the other inmates?

"PROSECUTING ATTORNEY: Objection.

"BY THE COURT: Objection sustained."

The defendant asserts in this Court that the purpose of the questions was to elicit evidence concerning the defendant's nonviolent character and reputation. *See* Maryland Code (1974, 1984 Repl. Vol.), § 9-115 of the Courts and Judicial Proceedings Article, allowing a witness to give his personal opinion of

RECEIVED
HAND DELIVERED
AUG 18 1987
OFFICE OF THE CLERK
SUPREME COURT, U.S.

87-5367

RALPH MILLS,	*	IN THE
Petitioner	*	SUPREME COURT OF
v.	*	THE UNITED STATES
STATE OF MARYLAND,	*	OCTOBER TERM, 1987
Respondent	*	No.

****

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of August, 1987, three copies of the foregoing Petition for Writ of Certiorari were delivered to the Office of the Attorney General, The Munsey Building - Fourth Floor, 7 North Calvert Street, Baltimore, Maryland 21202.

George E. Burns, Jr.
Assistant Public Defender
Appellate Division
Second Floor
312 North Eutaw Street
Baltimore, Maryland 21201
333-4842

Counsel for Petitioner

another person's character where character evidence is relevant;[3] *Durkin v. State*, 284 Md. 445, 397 A.2d 600 (1979). *See also Poole v. State*, 295 Md. 167, 181, 453 A.2d 1218 (1983); *Comi v. State*, 202 Md. 472, 478-479, 97 A.2d 129, *cert. denied*, 346 U.S. 898, 74 S.Ct. 223, 98 L.Ed. 399 (1953). The defendant, however, frankly acknowledges that the above questions were "not couched . . . in . . . terms . . . [of] the character and reputation of Appellant for violence." (Brief, p. 22).

As the questions were not worded in terms of character evidence, as the witness was not asked to give an opinion concerning the defendant's character or reputation, and as there was no proffer or explanation given to the trial judge by defense counsel, we cannot conclude that the trial judge committed error in sustaining the objections.

Furthermore, even if it be assumed arguendo that the trial court did err in sustaining the objections, such error would be harmless. In light of the overwhelming evidence of the defendant's guilt and the nature of his crime, it is

---

3 Section 9-115 states as follows:

> "Where character evidence is otherwise relevant to the proceeding, no person offered as a character witness who has an adequate basis for forming an opinion as to another person's character shall hereafter be excluded from giving evidence based on personal opinion to prove character, either in person or by deposition, in any suit, action or proceeding, civil or criminal, in any court or before any judge, or jury of the State."

virtually inconceivable that the view of a fellow inmate, who was the defendant's uncle, that the defendant has previously been nonviolent in the institution, might have changed the guilty verdict. We are convinced, "beyond a reasonable doubt, that the error in no way influenced the verdict," *Dorsey v. State*, 276 Md. 638, 659, 350 A.2d 665, 678 (1976). "[T]here is no reasonable possibility that the [exclusion of the] evidence . . . may have contributed to the rendition of the guilty verdict." *Ibid.*

V.

Mills's next contention is that the trial court erred in denying his motion to impanel separate juries for the guilt or innocence phase and the penalty phase of his trial. Mills's argument is identical to that rejected by the Supreme Court in *Lockhart v. McCree*, U.S. , 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986), and rejected by this Court in several cases. *See State v. Tichnell*, *supra*, 306 Md. at 458; *Booth v. State*, *supra*, 306 Md. at 192; *Evans v. State*, 304 Md. 487, 522, 499 A.2d 1261 (1985), *cert. denied*, U.S. , 106 S.Ct. 3310, 92 L.Ed.2d 722 (1986); *Foster v. State*, *supra*, 304 Md. at 453-466. These cases are dispositive of the issue.

VI.

A.

The defendant's principal argument is that the Maryland capital punishment statute, as applied, is uncon-

stitutionally mandatory. Mills's analysis begins with Code (1957, 1982 Repl. Vol.), Art. 27, § 413(h)(2), which provides as follows:

> "If it [the court or jury] finds that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death."

Former Maryland Rule 772A, in effect at the time of the defendant's trial, implemented the statutory provision by giving the jury a form to fill out. The instructions on the form told the jury that if one or more aggravating circumstances were present, and if no mitigating circumstances were found, the jury should enter "Death" on the part of the form for the sentence. In the present case, the jury found that one aggravating factor had been established, namely that Mills was an inmate in a correctional institution at the time he committed the murder. The jury found no mitigating circumstance, and it determined that the sentence should be death.

Relying primarily on *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), and *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976), Mills maintains that "any statutory scheme which requires the return of a death sentence without providing the sentencer with an option to impose a life sentence is invalid." (Brief, p. 47). In this case, according to Mills, once the jury found

one aggravating circumstance and no mitigating circumstances, the statute required the jury to return a sentence of death. Mills suggests that, although no mitigating factors were found, "there is nothing in the record to indicate that had the jurors been given a choice, any one of them would have considered the ultimate sanction appropriate." (*Ibid.*). Because, in the defendant's view, the Maryland statute may mandate a death sentence under circumstances where the sentencing authority is not convinced that death is the appropriate punishment, it is claimed that the statute violates the Eighth and Fourteenth Amendments.

This Court has rejected arguments like that set forth above on several occasions. *See, e.g., Oken v. Tidwell*, *supra*, 306 Md. at 467-468; *Booth v. State*, *supra*, 306 Md. at 224; *Huffington v. State*, 304 Md. 559, 587, 500 A.2d 272 (1985), *cert. denied*, U.S. , 106 S.Ct. 3315, 92 L.Ed.2d 748 (1986); *Foster v. State*, *supra*, 304 Md. at 473-475; *Mills v. State*, *supra*, 297 Md. at 637; *Tichnell v. State*, 287 Md. 695, 728, 415 A.2d 830 (1980). We have held that the Maryland capital punishment statute does not require the death sentence if the jury believes death to be inappropriate and that it is not a mandatory death penalty statute. As explained in the *Foster* case (304 Md. at 474-475),

"§ 413(g)(8) includes as mitigating circumstances '[a]ny other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case.' We held in *Tichnell I* that, because of this provision, the Maryland statute 'is not a mandatory death penalty statute,' and satisfies the standards of *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), and *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). 287 Md. at 728, 415 A.2d 830. We reiterated this holding in *Calhoun*, pointing out that under the Maryland statute 'the sentencing authority may articulate *any factor* it finds in mitigation.' 297 Md. at 637 468 A.2d 45.

"Therefore, the defendant erroneously argues that 'if the defendant fails to meet his burden of proof and persuasion' concerning mitigating circumstances, death 'may be mandated where the sentencer is unconvinced that death is the appropriate punishment.' . . . A sentencing authority, unconvinced that death is appropriate, may list as a mitigating circumstance whatever factor or factors may have led to this conclusion, irrespective of what the defendant produced or argued. If the sentencing authority perceives anything relating to the defendant or the crime which causes it to believe that death may not be appropriate, it may treat such factor as a mitigating circumstance and decide that it outweighs the aggravating circumstances."

The defendant Mills responds by indicating that the above-quoted holding'may be accurate if all twelve jurors can agree upon the same mitigating factor and can agree that it outweighs the aggravating factor. (Reply brief, p. 16). Mills asserts, however, that "[t]he defense adduced evidence of a number of such [mitigating] factors, and individual jurors may well have been persuaded of their existence. Again, any number of jurors

may have concluded . . . that the mitigating factors outweighed the aggravating . . . . Nevertheless, the mechanical operation of the statutory scheme permitted no choice - the jurors were required to return a death sentence whether they believed it justified . . . or not." (*Ibid.*).

Under the defendant's construction of the statute, unless all twelve jurors can agree that some mitigating factor or factors exist, and further, unless all twelve jurors can agree on the existence of the *same* mitigating factor or factors, the jury must conclude that there are no mitigating factors and that, if an aggravating circumstance has been found, the sentence must be death. Additionally, according to the defendant, all twelve jurors must agree that the same mitigating factor or factors outweigh the aggravating circumstances in order for the penalty to be other than death.[4] For example, under Mills's view, in a hypothetical case six jurors might believe that the accused was of "youthful age," that this factor outweighed the aggravating circumstances found, but that there were no other mitigating factors. Six other jurors might disagree concerning youthful age but might believe that the accused suffered from an unfortunate childhood, that this was a mitigating factor, and that it outweighed the aggravating

---

[4] While raised in the briefs, this contention by the defendant was developed more extensively during oral argument before this Court.

factors. Yet because it could not *unanimously* mark "yes" to any one mitigating circumstance, according to Mills's theory the jury would be required to find that no mitigating circumstance existed and, therefore, would be required to return a sentence of death.

Like other challenges to the validity of the Maryland death penalty statute that have been made,[5] the defendant's argument is premised upon an erroneous construction of the statute.

Nothing in the pertinent language of the death penalty statute purports to abolish the traditional common law and Maryland requirement that, absent waiver, jury determinations of critical issues must be unanimous. This requirement of unanimity generally extends to all matters submitted to the jury; it applies to the entire jury determination. As stated by this Court long ago, a "'verdict is the *unanimous* decision made by the jury . . . on the matters lawfully submitted to [it] in the course of the trial.' *Unanimity* is indispensable to the sufficiency of the verdict . . . ." *Ford v. The State*, 12 Md. 514, 549 (1859) (emphasis in original).[6] The Maryland

---

5 *See, e.g.*, Foster v. State, *supra*, 304 Md. at 471-480.

6 *See, generally, e.g.*, Articles 5 and 21 of the Maryland Declaration of Rights; Smith v. State, 299 Md. 158, 163-166, 472 A.2d 988 (1984); State v. McKay

death penalty statute refers to "the jury" as a single entity, making its findings and determinations concerning the presence or absence of aggravating circumstances, the existence of mitigating circumstances, and the weighing of one set against the other. Art. 27, § 413, subsections (d), (f), (g) and (h).[7]

---

6 (Cont'd)

280 Md. 558, 561-562, 566-574, 375 A.2d 228 (1977); Coby v. State, 225 Md. 293, 297-299, 170 A.2d 199 (1961); 2 Poe, *Pleading and Practice* § 333 (1925 ed.).

7 These provisions, in relevant part, are as follows:

> "(d) *Consideration of aggravating circumstances.* - In determining the sentence, the court or jury, as the case may be, shall first consider whether, beyond a reasonable doubt, any of the following aggravating circumstances exist:
>
> * * *
>
> "(f) *Finding that no aggravating circumstances exist.* - If the court or jury does not find, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall state that conclusion in writing, and the sentence shall be imprisonment for life.
>
> "(g) *Consideration of mitigating circumstances.* - If the court or jury finds, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall then consider whether, based upon a preponderance of the evidence, any of the following mitigating circumstances exist:
>
> * * *
>
> "(h) *Weighing mitigating and aggravating circumstances.* - (1) If the court or jury finds that one or more of these

The jury is required to set forth its decisions on these matters on a form which, while relating to the sentence, is essentially a verdict sheet.[8] The death penalty statute expressly reflects the traditional requirement of unanimity, as it provides in § 413(i) as follows (emphasis added):

> "(i) *Determination to be written and unanimous.* - The determination of the court or jury shall be in writing, and, if a jury, *shall be unanimous* and shall be signed by the foreman."

See Harris v. State, 295 Md. 329, 339-340, 455 A.2d 979 (1983).

Consequently, the defendant Mills correctly argues that for the jury *to determine* that the sentence is to be *life* imprisonment, the decision that there are mitigating circumstances not outweighed by aggravating circumstances must be arrived at unanimously. Because of the same statutory requirement of unanimity, however, for the jury *to determine*

---

7 (Cont'd)

> mitigating circumstances exist, it shall determine whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances.
>
> "(2) If it finds that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death.
>
> "(3) If it finds that the mitigating circumstances outweigh the aggravating circumstances, the sentence shall be imprisonment for life."

8 *See* former Rule 772A, which governed the instant capital sentencing proceeding.

that the sentence is to be *death*, the decision that there exists at least one aggravating circumstance which outweighs whatever mitigating circumstances may exist must also be arrived at unanimously. There is utterly no basis in the statutory language or in logic for Mills's conclusion that whenever the jurors cannot unanimously agree on the same mitigating circumstance or circumstances, the result will always be a sentence of death. As long as one juror believes that there exists a mitigating factor, and that this factor is not outweighed by the aggravating circumstances, and if such juror continues to adhere to his or her position, the sentence will not be death under the statutory scheme. It is true that, if there is ultimate disagreement among the jurors, there may be no *jury* determination of a life sentence. In this situation, however, there will also be no jury determination of a death sentence. Instead, the sentence will be life imprisonment, under Art. 27, § 413(k)(2), which states:

> "(2) If the jury, within a reasonable time, is not able to agree as to sentence, the court shall dismiss the jury and impose a sentence of imprisonment for life."

Thus, in the hypothetical case described earlier, where six jurors found the existence of the statutory mitigating factor of youthful age and believed that it was not outweighed by aggravating circumstances, but found no other mitigating factors, while the other six jurors refused to

find the existence of youthful age but found the existence of a different mitigating factor, the jury as a single entity would not be able to indicate on the sentencing form that any particular mitigating factor existed because of the lack of unanimity among jurors. But, contrary to the defendant's argument, the same lack of unanimity would preclude the jury from indicating that no mitigating factors were present. And, as long as at least one of the jurors adhered to the view that there was a mitigating circumstance not outweighed by the aggravating circumstances, the sentence would ultimately be life imprisonment. Even if the other eleven jurors became convinced that there were no mitigating factors, it would nevertheless be improper for the jury to decide that no mitigating factors exist and that the sentence should be death. This would be "majority rule," contrary to the traditional Maryland requirement of jury unanimity which is expressly embodied in § 413(i) of the Maryland death penalty statute.

To reiterate, as long as one juror perceives any factor relating to the crime or the defendant which he regards as a mitigating factor and which he believes is not outweighed by the aggravating circumstances, the jury will not be able to determine that the sentence shall be death. Moreover, as pointed out repeatedly in our cases, if a juror does not believe that death is the appropriate punishment, whatever

factor relating to the crime or the defendant that led to such belief may be regarded by that juror as a mitigating circumstance not outweighed by aggravating circumstances. Assuming that such juror does not change his mind after jury deliberations for a reasonable time, the sentence in the case will be life imprisonment under § 413(k)(2).

While no issue has been raised by the defendant Mills concerning the sentencing form or the jury instructions in this regard, it is noteworthy that both the form and the instructions were entirely in accord with the requirement that the critical jury determinations be reached by the unanimous vote of the jurors. The sentencing form, with the jury's answers, was in part as follows (emphasis added):

> "Based upon the evidence we unanimously find that each of the following aggravating circumstances which is marked 'yes' has been proven BEYOND A REASONABLE DOUBT and each aggravating circumstance which is marked 'no' has not been proven BEYOND A REASONABLE DOUBT:
>
> "1. The victim was a law enforcement officer who was murdered while in the performance of his duties.
>
> ____ yes X no
>
> "2. The defendant committed the murder at a time when he was confined in a correctional institution.
>
> X yes ____ no
>
> * * *

"10. The Defendant committed the murder while committing or attempting to commit robbery, arson or rape or sexual offense in the first degree.

____ yes X no

"(If one or more of the above are marked 'yes', complete Section II. If all of the above are marked 'no', do not complete Sections II and III.)

"SECTION II

"Based upon the evidence *we unanimously find that* each of the following mitigating circumstances which is marked 'yes' has been proven to exist by A PREPONDERANCE OF THE EVIDENCE and *each mitigating circumstance marked 'no' has not been proven* by A PREPONDERANCE OF THE EVIDENCE:

"1. The defendant previously (i) has not been found guilty of a crime of violence; and (ii) has not entered a plea of guilty or nolo contendere to a charge of a crime of violence; and (iii) has not been granted probation on stay or entry of judgment pursuant to a charge or a crime of violence. As used in this paragraph, 'crime of violence' means abduction, arson, escape, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery, or rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.

____ yes X no

"2. The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

____ yes X no

"3. The defendant acted under substantial duress, domination or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution.

____ yes X no

"4. The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder or emotional disturbance.

____ yes X no

"5. The youthful age of the defendant at the time of the crime.

____ yes X no

"6. The act of the defendant was not the sole proximate cause of the victim's death.

____ yes X no

"7. It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

____ yes X no

"8. Other mitigating circumstances exist, as set forth below:

None

(Use reverse side if necessary)

* * *

"We *unanimously* determine the sentence to be Death.

[Signatures of all twelve jurors]"

It is clear that the form required the jurors to agree unanimously that there were no mitigating factors in order for the jury to mark "no" with respect to all statutory or other possible mitigating factors. Despite the suggestion to the contrary in the dissenting opinion, there is no ambiguity in the language of Section II concerning unanimity. The words are: "we unanimously find that each of the following mitigating circumstances which is marked 'yes' has been proven to exist . . . and each mitigating circumstance marked 'no' has not been proven . . . ." In addition to the clause referring to each mitigating circumstance marked "yes," the clause referring to each mitigating circumstance marked "no" is also the object of "we unanimously find that." The sentencing form or "verdict sheet," as completed in this case, demonstrates that not a single juror found the existence of any mitigating circumstance.

The trial judge's instructions in the present case similarly emphasized that jury determinations must be unanimous. After the court clerk handed the jurors copies of the sentencing form, the trial judge instructed the panel as follows: "Let me remind you that in reaching your determination as to any of the issues raised by the case and presented to you on this sentencing form your verdict must be unanimous;

that is, all twelve of you must agree." When the trial judge explained mitigating circumstances to the jury, he said: "Again I stress that your finding as to mitigating circumstances must be unanimous, that is you must all agree." At the end of his instructions the judge said: "Again let me remind you of . . . the requirement that your verdict or your decision with regard to any of these items must be unanimous." After closing arguments, just before the jury retired to deliberate, the judge added: "Let me remind you that . . . as you consider each of the circumstances you must indicate *yes or no*, however your *unanimous* decision falls. You must indicate either yes or no as to each of those circumstances." (Emphasis added). The jury was fully instructed that it must be unanimous in finding that no mitigating circumstances existed. In light of the verdict sheet and the trial judge's instructions, there is no basis for Mills's speculation that some of the jurors might have believed that some mitigating factors existed.

Finally, we are aware of no Maryland authority which would support the apparent view of the defendant and of Judge McAuliffe that, if jurors are unable to agree unanimously in favor of one party or one side of an issue submitted, but remain in disagreement, the result is somehow a verdict or determination in favor of the other party or the other side of the issue. Judge McAuliffe

suggests in his dissenting opinion that when a jury is asked if a particular circumstance exists or has been proven, unanimity is required for the jury to answer the question in the affirmative but not in the negative. The dissent states that "[i]f one juror believes it has been so proven, but eleven do not the jury answers 'no' to the question . . . ." This is not, however, how the jury system and the burden of proof traditionally function.

For example, in many ordinary tort cases, the only disputed issue is whether the plaintiff has met the burden of proving that the defendant was negligent. The ultimate question regarding liability presented to the jury is: "has it been proven that the defendant was negligent?" If all twelve jurors agree that the plaintiff has proven negligence, there will be a verdict for the plaintiff. If all twelve jurors believe that the plaintiff has failed to prove negligence, there will be a verdict for the defendant. But, any other alignment will result in a hung jury. Thus, if one juror believes that the plaintiff has proven that the defendant was negligent, and if eleven jurors believe that the plaintiff has failed to prove negligence, the result is not a verdict for the defendant. In this situation, the jury is unable to answer the question "was the defendant negligent?" The fact that the plaintiff has the burden of proof does not result in some form of majority or plurality rule.

Rather, the burden of proof operates with respect to each juror individually.

The same is true in a cr: inal case. As previously pointed out, the jurors must be unanimous one way or the other on all issues submitted, *Ford v. The State*, *supra*, 12 Md. at 549. If one juror believes that the State has met its burden of proving the defendant's guilt, but the other eleven jurors are not convinced beyond a reasonable doubt of guilt, the result is not an acquittal but a hung jury. Otherwise, there would be no need for modified *Allen*-type instructions to jurors who are unable to reach unanimous agreement. *See, e.g., Mayfield v. State*, 302 Md. 624, 490 A.2d 687 (1985); *Goodmuth v. State*, 302 Md. 613, 490 A.2d 682 (1985); *Burnette v. State*, 280 Md. 88, 371 A.2d 663 (1977); *Kelly v. State*, 270 Md. 139, 310 A.2d 538 (1973).

The dissenting opinion, at another point, seems to agree that the jury's "determination of any ultimate issue essential to the verdict must be unanimous." The dissent goes on to state, however, that "where alternative findings of historic facts are advanced in support of a single conclusion the better rule is that the jurors need not agree on any single alternative fact provided they all agree on some alternative fact that leads them to a single conclusion on the ultimate issue." We shall assume that this is the "better rule" with regard to alternate findings of historical

facts in support of a single conclusion. Nevertheless, the presence or absence of aggravating and mitigating circumstances, and the weighing of aggravating against mitigating circumstances, all fall into the category of "ultimate issues." The General Assembly by statute has made them the critical issues to be submitted to and determined by the capital sentencing jury. Not only are they "ultimate issues essential to the verdict," but, under the statute and rule, the jury's determinations of the presence or absence of aggravating and mitigating circumstances constitute part of the "verdict" itself. As such, unanimity is contemplated under Maryland law. Art. 27, § 413(i); *Smith v. State*, 299 Md. 158, 163-166, 472 A.2d 988 (1984); *Ford v. The State*, *supra*, 12 Md. at 549.

The defendant Mills's contention, concerning the effect of juror disagreement on an issue, is also contrary to the position taken generally throughout the country. The cases regularly point out that unanimity is required for a jury determination on either side of an issue, that the burden and standard of proof operate upon each juror individually and not upon the jury collectively on a majority basis, and that the failure to achieve unanimity on either side of an issue ordinarily results in a hung jury. *See generally*, e.g., *Bodt v. State*, 29 Ala.App. 152, 193 So. 560 (1940); *Brown v. State*, 369 A.2d 682, 684 (Del. 1976); *Castle v. The State*, 75 Ind. 146 (1881); *Stitz v. The State*, 104 Ind. 359, 362-363, 4 N.E.

145 (1885); *Garden v. Moore*, 174 Iowa 376, 156 N.W. 410, 411 (1916); *The State v. Stewart*, 52 Iowa 284, 286-287 (1879); *Easter v. State*, 191 Miss. 651, 4 So.2d 227, 137 A.L.R. 391 (1941); *Commonwealth v. Witt*, 93 Pa.Super. 446, 448-449 (1928); *State v. Harris*, 89 R.I. 202, 206-207, 152 A.2d 106 (1959); *Casstevens v. Texas & P. Ry. Co.*, 119 Tex. 456, 32 S.W.2d 637, 638 (1930); *State v. Wisman*, 94 W.Va. 224, 118 S.E. 139, 141 (1923); *State v. McCausland*, 82 W.Va. 525, 96 S.E. 938, 941 (1918); Anno., *Reasonable Doubt of Individual Juror*, 137 A.L.R. 394 (1942); 1 *Underhill's Criminal Evidence*, § 30 (6th ed.); 1 *Wharton's Criminal Evidence* § 11 (13th ed.).

This principle of unanimity has specifically been applied to jury determinations of the penalty in capital cases. Thus, in *Andres v. United States*, 333 U.S. 740, 746-749, 68 S.Ct. 880, 92 L.Ed. 1055 (1948), a statute provided that the jury in a murder case could qualify its verdict by adding "without capital punishment," that if the jury so qualified its verdict the punishment would be life imprisonment, but that "[i]f a qualified verdict is not returned, the death penalty is mandatory." 333 U.S. at 746. The government's argument, somewhat like the defendant's argument in the instant case, was that the jurors were required to be unanimous in order for the jury to add the qualification but that unanimity was not required to reject the qualification. In the government's

view, if the jurors remained in disagreement, there would be no qualification, and the sentence would be death. The Ninth Circuit rejected the government's argument, holding "that unanimity of the jury was required both as to guilt and the refusal to qualify the verdict by the words 'without capital punishment.'" *Id.* at 746-747. The Supreme Court in *Andres* agreed with the Ninth Circuit and disagreed with the government, stating as follows (*id.* at 748-749):

> "Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. In criminal cases this requirement of unanimity extends to all issues - character or degree of the crime, guilt and punishment - which are left to the jury. . . . [W]e conclude that the construction placed upon the statute by the lower court is correct - that the jury's decision upon both guilt and whether the punishment of death should be imposed must be unanimous. This construction is more consonant with the general humanitarian purpose of the statute and the history of the Anglo-American jury system than that presented by the Government."

Numerous cases are in accord with the position taken in *Andres* concerning the jury's finding of mitigation or determination of the penalty in a capital case. *See, e.g., Smith v. United States*, 47 F.2d 518, 519-520 (9th Cir. 1931); *People v. Green*, 47 Cal.2d 209, 302 P.2d 307, 315-322 (1956); *People v. Hall*, 199 Cal. 451, 249 P. 859 (1926); *State v. Reynolds*, 41 N.J. 163, 187, 195 A.2d 449 (1963); *People v. Hicks*, 287 N.Y. 165, 170-171, 174, 38 N.E.2d 482 (1941). *See also, Davis v. State*, 51 Okla.Cr. 386, 389-390, 393-397, 1 P.2d 824, 2 P.2d

965 (1931); Anno., *Unanimity As To Punishment in Criminal Case Where Jury Can Recommend Lesser Penalty*, 1 A.L.R.3d 1461 (1965). *Contra: Commonwealth v. Stewart*, 359 Mass. 671, 270 N.E.2d 811, 814-815 (1971), *vacated*, 408 U.S. 845, 92 S.Ct. 2845, 33 L.Ed.2d 744 (1972).[9]

Consequently, we reject the defendant's argument that whenever the jurors cannot unanimously agree on the same mitigating circumstance or circumstances, they must return a death sentence.

B.

The foregoing discussion disposes of the defendant's contention that the Maryland death penalty statute, as applied to the facts of this case, is unconstitutionally mandatory.[10]

---

[9] With regard to the requirement of unanimity in cases under recent death penalty statutes, see Whalen v. State, 492 A.2d 552, 562 (Del. 1985); State v. Loyd, 459 So.2d 498, 503 (La. 1984); State v. Williams, 23 Ohio St.3d 16, 490 N.E.2d 906, 913 (1986); State v. Jenkins, 15 Ohio St.3d 164, 473 N.E.2d 264, 306-307 (1984); Evans v. Commonwealth, 228 Va. 468, 323 S.E.2d 114, 121 (1984), cert. denied, 471 U.S. 1025, 105 S.Ct. 2037, 85 L.Ed.2d 319 (1985); State v. Mak, 105 Wash.2d 692, 718 P.2d 407, 442, 445, cert. denied, U.S. , 107 S.Ct. 599, 93 L.Ed.2d 599 (1986).

The only case of which we are aware supporting the defendant Mills's argument under a recent death penalty statute (although not supporting his view as to constitutionality) is State v. Kirkley, 308 N.C. 196, 302 S.E. 2d 144, 156-157 (1983). The North Carolina court cited no authority in support of its conclusion.

[10] The defendant also asserts that the Maryland death penalty statute is unconstitutional with regard to

Nevertheless, considering the defendant's misconstruction of the statute and the views expressed in the dissenting opinion, we believe that it would be useful for future guidance to comment generally upon the required jury determinations under Art. 27, §§ 413(d)(f)(g) and (h) in light of the traditional requirement of unanimity which is expressly embodied in § 413(i).

In the usual criminal trial, of course, involving the issue of whether the defendant committed the offense charged, the result of a hung jury is ordinarily a mistrial and, at the state's option, a new trial on the issue. It is clear from Art. 27, § 413(k)(2), however, that the General Assembly did not intend for juror disagreement in a capital sentencing proceeding to result in a mistrial and a new sentencing proceeding. As previously pointed out, § 413(k)(2) provides for dismissal of the jury and a court-imposed life sentence "[if] the jury, within a reasonable time, is not able to agree as to sentence."

One difficulty in applying § 413(k)(2) is that the General Assembly has required more of the jury than the single determination of what the sentence should be. Under §§ 413(d)

---

10 (Cont'd)

the allocation of the burden of proof. The identical argument has repeatedly been rejected by this Court. See Foster, Evans and Huffington v. State, 305 Md. 306, 503 A.2d 1326, *cert. denied*, U.S. , 106 S.Ct. 3310, 3315, 92 L.Ed.2d 722, 723, 745 (1986); Foster v. State, *supra*, 304 Md. at 471-480, and cases there cited.

(f) (g) and (h), the jury must make decisions concerning the existence or non-existence of aggravating circumstances, the existence or non-existence of mitigating circumstances, and the weighing of aggravating against mitigating circumstances. Moreover, analytically (if not always practically) these decisions are to be made in sequential stages. The matter which the statute does not fully address is what happens where the jurors are unable to achieve entirely the contemplated unanimity and there is juror disagreement at different stages and with respect to different types of issues.

Section 413(d) first requires the jury to determine whether or not any of ten statutorily specified aggravating circumstances exist. Section 413(f) states that if the jury "does not find, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall state that conclusion in writing, and the sentence shall be imprisonment for life." Section 413(g) then provides that if the "jury finds beyond a reasonable doubt, that one or more of these aggravating circumstances exist," the jury must go on to a consideration of mitigating circumstances. Under these provisions, a finding that at least one aggravating circumstance exists is clearly a precondition for the jury to consider mitigation, weighing and the possibility of a death sentence.

Consequently, absent a finding of an aggravating factor, a life sentence is to be imposed at the conclusion

of the proceedings under subsection (d) and (f). If the jurors unanimously find the absence of any statutory aggravating circumstance, the jury under subsection (f) completes the verdict sheet accordingly and a life sentence is imposed. If the jurors are in disagreement and, after a reasonable period of time, unable to determine unanimously (as required by § 413(i)) that at least one aggravating circumstance is present, § 413(k)(2) comes into operation, the jury is dismissed, and the court imposes a life sentence.

The situation may also arise in connection with aggravating circumstances where the jurors unanimously agree that one or more aggravating circumstances exist, unanimously agree that several aggravating circumstances do not exist, but, after a reasonable time, remain in disagreement over the existence of one or more other possible aggravating circumstances listed in the statute. It is obvious that § 413(k)(2) does not operate in this situation to terminate the proceeding, because § 413(g) makes it clear that, upon a finding of only one statutory aggravating circumstance, the jury is to proceed and consider possible mitigating circumstances. Thus, in the hypothetical situation posed, the jury should mark "yes" on the form or verdict sheet as to the aggravating circumstance or circumstances which it finds present, should mark "no" as to the aggravating circumstance or circumstances which it finds absent, should not give any answer as to the presence or absence of the aggravating circumstance or circumstances over

which it remains in disagreement, and should proceed to consider the presence or absence of mitigating circumstances under § 413(g).

Turning to the consideration of mitigating circumstances, § 413(g) requires the jury to decide "whether . . . any of the following [eight statutorily specified] mitigating circumstances exist." The eighth one is any fact which the jury believes is mitigating. Therefore, as discussed in Part A above, under the statute and implementing form prescribed by former Rule 772A, the jurors are expected to reach a unanimous decision concerning the presence or absence of each mitigating circumstance, as the jurors in the instant case did. The statute then provides in § 413(h) that "[i]f the court or jury finds that one or more of these mitigating circumstances exist, it" shall weigh the mitigating circumstances against the aggravating, determine which outweighs the other, and enter a sentence of life imprisonment or death depending on which outweighs the other.

The express language of the statute in §§ 413(g) and (h), however, contains substantial gaps. There is no provision, comparable to § 413(f) (regarding the absence of aggravating circumstances), telling the court or jury what to do if it finds no mitigating circumstances. Furthermore, there is no provision specifying what happens if the jurors are divided over some mitigating circumstances and thus cannot reach a complete determination. The language of §§ 413(g) and (h)

deals only with the situation where the court or jury determines that one or more mitigating circumstances exist.

Nevertheless, the General Assembly obviously did not intend that the sentencing proceedings should end in a stalemate and that § 413(k)(2) should be invoked if the jury failed to find any mitigating circumstance. This would result in a life sentence for a defendant where there is no finding of mitigation. In contrast, § 413(h) would require a death sentence for the defendant where there is a finding of mitigating circumstances but they are deemed outweighed by aggravating circumstances. Such construction of the statute would be entirely unreasonable.

The General Assembly, however, did provide that procedural gaps in the statute could be filled by the Court of Appeals. Section 413(1) states:

> "The Court of Appeals may adopt rules of procedure to govern the conduct of a sentencing proceeding conducted pursuant to this section, including any forms to be used by the court or jury in making its written findings and determinations of sentence."

Pursuant to subsection (1), this Court in former Rule 772A provided for the situation where the court or jury determined that no mitigating circumstance existed. The sentencing form specifies that, where there is a determination of no mitigating circumstances, the sentence is to be death. This is logical and in accord with the General Assembly's purpose that mitigating and aggravating circumstances be weighed. If there

are no mitigating circumstances, there is nothing to weigh against the aggravating factors; one side of the scale is zero. Consequently, a death sentence is appropriate under the statutory scheme.

The sentencing form under former Rule 772A does not, however, deal with the situation where there is no jury agreement on the existence of any particular mitigating circumstance but where there also is no unanimous jury determination that no mitigating circumstance existed. This situation could take a variety of forms. For example, all of the jurors might agree that several very weighty mitigating circumstances are present, but there may be no unanimity concerning the existence of any one particular mitigating circumstance. At the other extreme, eleven jurors might believe that no mitigating circumstance exists, but one juror might insist that one mitigating circumstance exists although it is outweighed by the aggravating circumstances. It would not be consistent with the legislative scheme for the sentencing proceeding to be aborted under § 413(k)(2) in this situation.

In our view, where the jurors after a reasonable period of time cannot agree on any particular mitigating circumstance or circumstances, but also cannot agree that no mitigating circumstances exist, the jurors should proceed to the weighing process under § 413(h). Each juror should weigh the mitigating circumstance which he or she

finds, if any, against the aggravating circumstances which the jury under § 413(d) has unanimously found to exist. In this manner, a jury might well arrive at a unanimous determination on the sentence even though there was underlying disagreement on the presence or absence of some mitigating circumstances. This process comports with the general legislative intent that the imposition of the penalty in these cases should depend upon the weighing of mitigating and aggravating circumstances.

In sum, with regard to mitigating circumstances, the jury should mark the sentencing form "yes" for each mitigating circumstance which is unanimously found to exist, mark the form "no" for each mitigating circumstance which is unanimously found not to exist, and leave the form blank with regard to those mitigating circumstance (if any) as to which there is disagreement. Then, unless there is unanimity that no mitigating circumstance exists (such as in the instant case), the jurors should engage in the weighing process.

VII.

Mills next argues that the trial court erred in failing to instruct the jury that it must find that he was a principal in the first degree in order for the death penalty to be a possible sentence. Preliminarily, we note that Mills made no request for such instruction, and made no objection to the trial court's failure to give the instruction sua sponte.

Furthermore, under the facts of this case, the absence of the instruction could not have prejudiced Mills. There could be no doubt concerning the defendant's status as a principal in the first degree. Mills and the victim were isolated in a locked jail cell. Mills emerged with a bloody "shank" in his gloved hand and confessed to killing his cell mate, as previously described. He concedes in his brief "the absence of any factual dispute raised by the evidence" regarding the matter. (Brief, p. 53). Accordingly the omission in the trail court's instructions, even if error, was clearly harmless.

VIII.

Mills makes two additional complaints concerning the sentencing hearing. Neither matter, however, was preserved for appellate review. Rules 4-322, 4-325(e) and 885.

First, the defendant claims that the trial court's instruction to the jury on the possible mitigating circumstance of the youthful age of the defendant provided insufficient "guidance" and was "oversimplified." (Brief, pp. 53-54). We need not explore this question, as Mills never requested an instruction on the mitigating circumstance of youthful age, did not object to the instruction given, and defense counsel expressly stated at the conclusion of the trial judge's jury instructions: "The defense has no objection to the instructions given to the jury, your honor.

Second, the defendant asserts that the jury was permitted to hear "a great deal of inadmissible and highly prejudicial evidence." (Brief, p. 56). Not only was there no defense objection to this evidence, but some of the evidence complained of was apparently introduced by the defense. The defendant on appeal obviously cannot challenge the admissibility of this evidence.[11]

IX.

The defendant contends that the death sentence in this case is excessive and disproportionate to the penalty imposed in similar cases.[12] Mills cites six allegedly "similar cases" from the circuit courts involving homicides in correctional institutions.[13] In all six cases, the

---

[11] To the extent that trial counsel's tactics in deciding to present certain evidence may relate to the constitutional adequacy of counsel, the matter is not appropriate for resolution on direct appeal. It can be raised in a post conviction proceeding. Harris v. State, 299 Md. 511, 517-519, 474 A.2d 890 (1984), and cases there discussed.

[12] Art. 27, § 414(e)(4) requires that this Court determine "(4)[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

[13] They are State v. Parker, No. 26,113, Circuit Court for Anne Arundel County' State v. Holt, No. 5215, Circuit Court for Washington County; State v. Appleby, No. 18429601, Circuit Court for Baltimore City; State v. Ellison and Little, Nos. 18403101 and 18403103, Circuit Court for Baltimore City; State v. Gee, No. 18321508, Circuit Court for Baltimore City; State v. Mack, No. 5737, Circuit Court for Washington County.

defendants either were convicted of first degree murder and received life sentences or were convicted of second degree murder and received a term of years. The defendant Mills asserts that his "research has disclosed *no* cases in which murder perpetrated by an inmate has resulted in a death sentence." (Brief, p. 63).

Preliminarily, we note that because no person has previously been sentenced to death for a particular type of murder, under a recently enacted death penalty statute, does not mean that the first death sentence for that type of murder is necessarily disproportionate or excessive. Otherwise, no one would ever receive the ultimate penalty under a capital punishment statute requiring proportionality review. For a detailed discussion of proportionality review under the present Maryland capital punishment statute, as well as under similar statutes in other states, *see Tichnell v. State*, 297 Md. 432, 457-473, 468 A.2d 1 (1983), *cert. denied*, 466 U.S. 993, 104 S.Ct. 2374, 80 L.Ed.2d 846 (1984).

We have examined the six cases relied upon by the defendant Mills, and we conclude that the death sentence in the present case is not disproportionate or excessive in light of the sentences imposed in those cases. In only one of those cases was there a capital sentencing proceeding (*State v. Parker*), and there the sentencing authority found

as a mitigating factor that the defendant had a significant mental impairment. In the other cited cases there were factors or circumstances distinguishing them from the instant case. For example, in one case there was evidence that the defendant had been physically and verbally abused by the victim and in another cited case the jury could not determine whether the accused were principals in the first degree.

The record before us shows that Mills brutally stabbed his cell mate to death. There was neither evidence of provocation nor of a struggle; there was express evidence of long premeditation. Mills fingerpainted a slogan with the victim's blood, and he acknowledged the deed as soon as it was discovered. The jurors unanimously found no mitigating factors, and our review of the record confirms that the jury's action was warranted. Mills was serving a sentence for second degree murder at the time of this offense.

Considering the crime and the defendant, and comparing the penalty in this case to the death sentences imposed in cases such as *Booth v. State*, *supra*, 306 Md. 172; *Foster v. State*, *supra*, 304 Md. 439; and *Colvin v. State*, 299 Md. 88, 472 A.2d 953, *cert. denied*, 469 U.S. 873, 105 S.Ct. 226, 83 L.Ed.2d 155 (1984), where the defendants also brutally and without provocation stabbed their victims to death, we do not believe that the sentence here was disproportionate or excessive.

X.

Mills's final argument is that Art. 27, § 413(d)(2), specifying as an aggravating circumstance that "[t]he defendant committed the murder at a time when he was confined in any correctional institution," is unconstitutional. The gist of his contention is as follows (Brief, p. 66):

> "It is a fundamental constitutional requirement that 'an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.' *Zant v. Stephens*, 462 U.S. 862, 77 L.Ed.2d 235, 249-250 (1983). Applying the foregoing standard to § 413(d)(2) it is clear that this aggravating factor fails to meet the constitutional standard. Both of the traditional, presumably rational, concerns in dealing with prisoners -- escape and deterring 'lifers' -- are specifically provided for by other aggravating factors. Article 27, § 413(d)(3) & (8)."

In addition, Mills asserts that § 413(d)(2) is overly broad, covering some "individuals . . . no more culpable than members of society at large . . . ." (*Ibid.*).

In our view, the Maryland General Assembly was not constitutionally prohibited from listing as an aggravating circumstance the commission of a murder while an inmate in a correctional institution. This aggravating factor closely resembles one of the aggravating factors proposed by the Model Penal Code, and cited with approval in *Gregg v. Georgia*,

428 U.S. 153, 193-195 n. 44, 96 S.Ct. 2909, 2935 n. 4, 49 L.Ed.2d 859 (1976), namely that "[t]he murder was committed by a convict under sentence of imprisonment." Moreover, it seems plain to us that this circumstance does genuinely narrow the class of persons eligible for the death penalty.

Finally, the General Assembly is entitled to treat inmate status as an aggravating factor to deter inmates from murdering each other and those who come in contact with them. As pointed out by the Supreme Court of Arizona in *State v. Gillies*, 135 Ariz. 500, 662 P.2d 1007, 1019 (1983), the "legislative intent of this . . . [aggravating factor] is to protect the guards and other inmates at such institutions where a defendant is confined and to discourage violence by incarcerated persons." We cannot conclude that this legislative purpose is irrational. Furthermore, this purpose is not entirely met by other aggravating factors such as § 413(d)(3) and (8), concerning those sentenced to life imprisonment or death and those who escape or attempt to escape, neither of which would have been applicable to Mills.

We reject, therefore, the defendant's assertion that § 413(d)(2) is unconstitutional.[14]

---

[14] In light of the Supreme Court's recent decision in Booth v. Maryland, U.S. , S.Ct. , L.Ed.2d (1987), we note that in the instant case no "Victim Impact Statement" was introduced in

JUDGMENT AFFIRMED.

---

14 (Cont'd.)

evidence or even proffered. There was attached to the Division of Parole and Probation's investigation report a memorandum from Jane Christy of the victim/witness assistance program to the State's Attorney, summarizing an interview with the victim's brother and sister-in-law. This memorandum was admitted into evidence after Mills's counsel expressly informed the Court that he had read it and did not object to its admission. The memorandum stated in its entirety as follows:

> "Paul and Thomas Brown came from a family of six. At a very young age they were removed from their parents custody because of neglect and placed in separate foster homes. (Removal by the Department of Social Services was prompted by Paul being hospitalized at age 4 for anemia and malnutrition.)
>
> "Paul was a hyperactive child and hard to handle which resulted in a lot of beatings from his various guardians. He ran away constantly from the various homes in which he had been placed. After a while Paul, at the age of 15, just started living on the streets. He was eventually sent to the Maryland Training School for Boys. Paul never really had a home or a family as such. 'I (Thomas Brown) tried to keep in touch with Paul by writing and visiting him whenever possible. I always had good homes and a good life and always felt so guilty that there was nothing I could do to help Paul. After all, I was only one year older than he.'
>
> "'Paul was a good person who had a tough life, a lot of bad breaks, no family, no home, nobody to really give him a chance. I sometimes think he felt more secure in prison, because he had no one on the outside. Sure, he committed crimes, but he wasn't violent. He did what he had to do

14 (Cont'd)

to survive and he got involved with a lot of bad people."

This memorandum did not purport to be and did not fall within the statutory requirements of a victim impact statement. *See* Code (1957, 1986 Repl. Vol.), Art. 41, § 4-609(c). The memorandum did not describe the impact of the crime on the victim's family or the "family members' opinion and characterizations" of the crime and the defendant. Booth v. Maryland, *supra*. As defense counsel recognized at the sentencing proceeding in this case, the content of this statement would not inflame a jury or otherwise prejudice Mills. Consequently, the memorandum did not constitute the "victim impact evidence" found constitutionally inadmissible in Booth v. Maryland, *supra*.

IN THE COURT OF APPEALS OF MARYLAND

Nos. 22 and 73

September Term, 1986

RALPH WILLIAM MILLS

v.

STATE OF MARYLAND

Murphy, C.J.,
*Smith
Eldridge
Cole
Rodowsky
*Davis
McAuliffe,
JJ.

Concurring Opinion by
Murphy, C.J.

Filed: June 25, 1987

* Smith and Davis, JJ., now retired, participate in the hearing and conference of this case while active members of this Court; their being recalled pursuant to the Constitution, Article IV, Section 3A, to sit and participate in the decision and adoption of this opinion.

Murphy, C.J., concurring in the judgment:

I am in full agreement with the Court's affirmance of Mills' conviction for first degree murder. I also agree with the Court's judgment affirming the imposition of the death penalty, although I do not fully concur with the Court's construction of the statute and implementing rules, as set forth in Part VI of the opinion.

IN THE COURT OF APPEALS OF MARYLAND

Nos. 22 and 79

September Term, 1985

RALPH WILLIAM MILLS

v.

STATE OF MARYLAND

Murphy, C.J.
*Smith
Eldridge
Cole
Rodowsky
*Couch
McAuliffe,

JJ.

Concurring and Dissenting Opinion by McAuliffe, J.

Filed: June 25, 1987

* Smith and Couch, JJ., now retired, participated in the hearing and conference of this case while active members of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, they also participated in the decision and adoption of this opinion.

I concur in the decision to affirm the conviction. Because I am unable to agree with Part VI of the majority opinion and because I believe the sentencing procedure employed in this case was constitutionally unfair to the Defendant, I dissent from the affirmance of the sentence of death.

At the threshold of my disagreement with the majority lies a question of statutory construction. The majority holds that the Legislature intended to make the non-existence (as well as the existence) of aggravating and mitigating circumstances an ultimate issue in a capital sentencing proceeding, and therefore intended to require a unanimous verdict of existence or non-existence. I believe the Legislature intended to require unanimity for a finding of the existence of a circumstance, but did not intend to mandate a unanimous finding that any individual circumstance does not exist. I further believe it is probable, or at least reasonably possible, that this jury understood the language as the Legislature intended it, and that the answers of "no" given on the sentencing form represented their failure to unanimously find the existence of a circumstance, rather than a unanimous determination that the circumstance did not exist. This is no mere semantic difference, for if I am correct, it means that the procedure followed in this case impermissibly and unconstitutionally precluded the ultimate consideration of mitigating factors that may have been proven.

Moreover, even if I were to accept the majority's interpretation of the statute, I would find it intellectually difficult to accept the rather extraordinary, and I think illogical, "filling of the gaps" accomplished by Section VI.B of the majority opinion. Finally, if this newest creative interpretation of our capital punishment statute is entirely correct there should nonetheless be a new sentencing proceeding in this case. It is clear to me that no one at the trial could have understood the law to be as it is announced today, and the trial judge's instructions were to the contrary. I turn to a more detailed examination of these several problems.

Our death penalty statute mandates that the jury "shall first consider whether, beyond a reasonable doubt, any of the [enumerated] aggravating circumstances exist." Maryland Code, Art. 27, § 413(d). Combining that with the requirement of unanimity which appears elsewhere in the statute, I interpret the question presented to the jury as to each enumerated aggravating circumstance to be:

> Do the jurors unanimously determine that this aggravating circumstance has been proven to exist beyond a reasonable doubt?

If one juror believes it has been so proven, but eleven do not the jury answers "no" to the question, and that particular aggravating factor cannot be considered in the ultimate weighing process. Every relevant section of the statute speaks to whether the jury finds that an aggravating circumstance

exists--nothing therein suggests the jury must also be unanimous in determining that an aggravating circumstance does not exist. Consider the language of these sections:

> (d) [T]he court or jury, as the case may be, shall first consider whether, beyond a reasonable doubt, any of the following aggravating circumstances exist:
>
> * * *
>
> (f) If the court or jury does not find, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall state that conclusion in writing, and the sentence shall be imprisonment for life.
>
> (g) If the court or jury finds, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall then consider whether, based upon a preponderance of the evidence, any of the following mitigating circumstances exist:
>
> * * *
>
> (h) If the court or jury finds that one or more of these mitigating circumstances exist, it shall determine whether, by a preponderance of the evidence, mitigating circumstances outweigh the aggravating circumstances.[1]

---

[1] We have interpreted this language to mean that the jury shall determine whether, by a preponderance of the evidence, the aggravating circumstances outweigh the mitigating circumstances. Foster v. State, 304 Md. 439, 499 A.2d 1236 (1985), cert. denied, U.S. , 106 S.Ct. 3310 (1986).

Unfortunately, the form initially approved by this Court for use in capital sentence proceedings did not make clear that the requirement of unanimity with respect to consideration of an aggravating circumstance applied only to the question of whether that circumstance had been proven to exist. Rather, Maryland Rule 772A(d), effective January 1, 1979, approved the following language:

> Based upon the evidence we unanimously find that each of the following aggravating circumstances which is marked 'yes' has been proven BEYOND A REASONABLE DOUBT and each aggravating circumstance which is marked 'no' has not been proven BEYOND A REASONABLE DOUBT....

Although this language can accommodate the interpretation I believe to be correct, it also can accommodate the interpretation placed upon it by the majority--that the jurors must be unanimous in their determination that the aggravating circumstance does not exist in order to answer "no." A change in this language was made by the adoption of Rule 4-343(c) which supplanted Rule 772A(d), and which became effective July 1, 1984. That section now reads:

> Based upon the evidence we unanimously find that each of the following aggravating circumstances that is marked 'yes' has been proven BEYOND A REASONABLE DOUBT. Each of the aggravating circumstances that has not been so proven is marked 'no.'

This change, intended to be one of style and not substance, more accurately reflects the intent of the Legislature. Unfortunately, the new language is not so clear in its meaning

that it does not require explanation by means of careful instruction, and in any event the revised form was not used in this case. [2]

Had the sentencing form simply used the language of the statute by providing that "we unanimously find beyond a reasonable doubt that the following aggravating circumstances exist" and then listed the aggravating factors with a box to be checked as to each found to exist, I believe jurors would have had no difficulty in concluding they were to mark only those circumstances they unanimously found to have been proven to exist. They simply would not mark thos about which they disagreed. Because the jurors are specifically instructed that they may consider only the aggravating factors they have unanimously found to exist, the defendant is fully protected. Thus there is no need, much less any legislative mandate, for a jury to unanimously find that a particular aggravating circumstance does not exist before it may continue deliberation.

Not only is the legislative scheme for consideration and determination of aggravating circumstances adequate for the

---

2 The form actually used in this case tracked Rule 772A(d), rather than Rule 4-343(c). The latter rule was applicable and should have been followed, but that change alone would not have cured the deficiencies present in this sentencing procedure. I have reviewed other differences between the form actually used and that which should have been used, and I find no indication of possible prejudice to the Appellant.

protection of an accused, it may well grant him more protection than is constitutionally required. The Supreme Court of Virginia has held, for example, that the requirement of unanimity extends to the ultimate question of whether death is the appropriate sanction and to the question of existence of any statutory enumerated aggravating factors that justify the imposition of the death penalty, but not to the existence of each individual aggravating circumstance. Clark v. Commonwealth, 219 Va. 237, 257 S.E.2d 784, 791-92 (1979), cert. denied, 444 U.S. 1049 (1980). See also Briley v. Bass, 584 F.Supp. 807, 819 (E.D. Va.) (United States Constitution does not require that jury be unanimous as to aggravating factors relied upon in imposing death penalty), cert. denied, 469 U.S. 893 (1984); Blake v. State, 239 Ga. 292, 236 S.E.2d 637 (jury conclusion that sufficient aggravating circumstances exist cannot be impeached by showing that part of the jury proceeded upon one interpretation and part upon another), cert. denied, 434 U.S. 960 (1977)

In State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983), the Supreme Court of North Carolina considered and rejected a defendant's claim that the requirement of unanimity extended not only to the existence of aggravating and mitigating circumstances, but to their non-existence as well. That Court said, id. at 157:

> Defendant contends, however, that even if it is proper that a mitigating circumstance exist only when there is unanimous agreement by the jury, the trial judge erred when he

> instructed the jurors that a mitigating circumstance must be deemed not to exist in the absence of a unanimous agreement on its existence. Defendant urges this Court to impose the following requirement: that in order for a jury to find that a mitigating factor does not exist it must first unanimously agree it does not exist. If no unanimous agreement is reached, defendant contends, the result is a hung jury and the automatic imposition of life imprisonment. Although novel, the suggested approach is unworkable and contrary to the general principles of unanimity.
>
> * * * *
>
> The unanimity requirement is only placed upon the finding of whether an aggravating or mitigating circumstance exists.

The mandate of our statute that the jury specifically and in writing determine "[w]hich, if any, aggravating circumstances it finds to exist" obviates consideration of the above approach and the thorny subject of unanimity as it relates to the existence of aggravating circumstances. With this language the Legislature has made it clear that there must be unanimity as to each individual aggravating circumstance before it can be considered. Still, I shall return to the question of unanimity and a consideration of the levels at which it must be applied in the adjudicative process, when I turn to analysis of the proper function of the jury with respect to the consideration of mitigating circumstances.

Under Appellant's interpretation of the statute, with which I agree, a split of six-six on whether an aggravating or a mitigating circumstance has been proven to exist simply means that the answer of the jury should be "no", i.e. the jury cannot unanimously determine by the appropriate standard of persuasion that the particular circumstance has been proven to exist. As previously stated, this conclusion causes no difficulty with respect to aggravating circumstances. It is well within the province of the Legislature to determine that an aggravating circumstance cannot be considered unless all jurors agree that it has been proven to exist, even though that result is not constitutionally required.

It is quite a different matter, I suggest, for the Legislature to impose as a condition precedent to the collective consideration of relevant mitigating circumstances the requirement that all twelve jurors agree on the existence of each mitigating circumstance to be considered. As Appellant points out, the result of such a restriction not only would be illogical, but unconstitutional. Following Appellant's hypothetical situation and interpretation of the statute to a logical conclusion demonstrates the point. Because of the six-six split on the two mitigating circumstances, these circumstances have not been unanimously found to exist, and the form will be marked "no" as to each. If no enumerated or

separately articulated mitigating circumstance has received the unanimous vote of the twelve jurors, the answers to each of the eight paragraphs of Section II (the mitigating circumstances section) will be "no." The consequence of that situation is as automatic as it is deadly--the jurors are not permitted to engage in the weighing process or any deliberation on the appropriateness of the penalty of death, but are instructed that "[i]f Section II was completed and all of the answers were marked 'no', then enter 'Death'." Assuming there was a single aggravating circumstance in the hypothetical situation we have considered, and assuming that the six jurors who were not persuaded as to the existence of the first mitigating circumstance were the same six who were persuaded of the existence of the second mitigating circumstance in dispute, we are presented with twelve jurors who believe that relevant mitigating circumstances have been proven to exist and yet they are absolutely precluded from engaging in their principal function--the weighing of the aggravating against the mitigating circumstances to determine the appropriate sanction. It is entirely conceivable that if allowed to engage in appropriate deliberation on the ultimate question, the jurors may not be persuaded by a preponderance of the evidence that the aggravating circumstance outweighs the mitigating circumstance that each juror is convinced exists. To prohibit

the jury from considering relevant mitigating circumstances is to effectively sever the constitutionally indispensible "link between contemporary community values and the penal system" that the jury is intended to provide. Woodson v. North Carolina, 428 U.S. 280, 295, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (quoting Witherspoon v. Illinois, 391 U.S. 510, 519, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)). Drawing on the predicate that the penalty of death is qualitatively different from any other sentence, the Supreme Court said in Woodson, 428 U.S. at 304:

> [I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

Other hypothetical situations provide more dramatic evidence of the potential dangers of requiring a unanimous verdict on the question of the existence of each individual mitigating factor. If the vote of the jury is eleven to one for the existence of each of three mitigating circumstances and the dissenting vote is cast by a different juror in each instance, we can be certain that all twelve jurors have been convinced by a preponderance of the evidence that at least two relevant mitigating circumstances exist. Yet, because they do not agree on which two exist, the procedure employed in this case would

foreclose their consideration of any mitigating circumstances, even though they unanimously believe that some relevant mitigating factor has been proven to exist.

To understand the evolution of the Maryland death penalty statute into its present form, and to place in sharp focus the exact nature of the problem as it relates to the required consideration of mitigating circumstances, a brief history of legislative enactments and relevant case law may be helpful.[3] From 1908 until 1972 trial courts of general jurisdiction were vested with discretion to sentence a person convicted of first degree murder to either death or life imprisonment. In 1972 the United States Supreme Court held that the grant of such unfettered discretion to impose the sentence of death violated the Eighth and Fourteenth Amendments to the Federal Constitution. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Responding to Furman, this Court promptly declared Maryland's death penalty statute unconstitutional. Bartholomey v. State, 267 Md. 175, 297 A.2d 696 (1972). Unfortunately, we read Furman as holding at the death penalty is unconstitutional when its imposition is not mandatory." Bartholomey, 267 Md. at 184. The Legislature responded by passing a mandatory death penalty statute in 1975. Chapter 252, Acts of 1975, codified at Art. 27, § 413 of the Mary'and Code (1957, 1976 Repl. Vol.). Within a year the

[3] A more detailed history may be found in Tichnell v. State, 287 Md. 695, 720-29, 415 A.2d 830 (1980).

United States Supreme Court held that mandatory death penalty statutes for first degree murder were unconstitutional because they did not permit the sentencing authority to consider mitigating circumstances involving the accused and the character of the offense before deciding whether the imposition of the death penalty was appropriate. Woodson v. North Carolina, supra; Roberts v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). We then held the Maryland mandatory death penalty statute unconstitutional. Blackwell v. State, 278 Md. 466, 365 A.2d 545 (1976), cert. denied, 431 U.S. 918 (1977).

At the same time it decided Woodson, however, the Supreme Court upheld the capital punishment statutes of Georgia, Texas and Florida, finding that the discretion of the sentencing authority had been adequately directed and limited so as to minimize the risk of wholly arbitrary and capricious action, but retained sufficiently to permit consideration of appropriate mitigating factors and thus to maintain the essential link with contemporary community values. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Our Legislature then returned to the drawing board and produced a death penalty statute that it

believed consonant with the several views expressed in the joint opinions by which Gregg, Jurek and Proffitt were decided. Senate Bill 374 was enacted on March 10, 1978, as Chapter 3 of the Laws of 1978, and became effective July 1 of that year. That act established as conditions precedent for the imposition of the death penalty the same eight aggravating circumstances (with minor language changes) that had been contained in the 1975 mandatory death penalty law, but also added seven specific mitigating circumstances that could be considered by the sentencing authority in the ultimate determination of whether death was the appropriate sanction. Two days after the new statute went into effect the Supreme Court held that, with the possible exception of the rarest kind of capital case, a sentencing authority could "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Our Legislature responded to Lockett by enacting Chapter 321 of the Laws of 1979 to add the following paragraph to the list of mitigating circumstances to be considered by the sentencing authority:

> (8) Any other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case.

This serpentine path of evolution has been aptly described as the "product of a considerable history reflecting the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual." Eddings v. Oklahoma, 455 U.S. 104, 110, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). From the earlier concept that only mandatory death sentences would cure the problem of unbridled discretion condemned in Furman we have proceeded to an understanding that although the sentencer's discretion must be restricted to ensure that the penalty of death will not be inflicted in an arbitrary and capricious manner, the sentencer must be free to consider any relevant mitigating evidence regarding the character or record of the the defendant and any of the circumstances of the offense. Sumner v. Shuman, U.S. , S.Ct. , L.Ed.2d [No. 86-246 decided June 22, 1987]; Hitchcock v. Dugger, 481 U.S. , S.Ct. , L.Ed.2d [55 U.S.L.W. 4567] (1987); California v. Brown, U.S. , 107 S.Ct. 837, L.Ed.2d (1987); Skipper v. South Carolina, U.S. , 106.S.Ct. 1669, 90 L.Ed.2d 1 (1986). We now know that room must be left for interposition of societal judgments of mercy and sympathy that may be engendered by a consideration of relevant mitigating evidence. Id. In my view, the Maryland process for jury determination[4] of punishment in a capital case, consisting as it does of the requirements of both statute and

[4] Problems created by an improper and mechanical application of the requirement of unanimity are not present when the defendant elects to be sentenced by a judge.

rule, retains too much of the vestiges of the mandatoriness and fails to permit meaningful consideration of relevant mitigating circumstances.

The majority seems to suggest that no other application of the requirement of unanimity is possible--that the mandate of unanimity controls not only the verdict but also every subordinate predicate finding. Certainly where unanimity is required, the verdict must be unanimous. State v. McKay, 280 Md. 558, 375 A.2d 228, 97 A.L.R.3d 1238 (1977); Ford v. State, 12 Md. 514 (1859). Furthermore, the determination of any ultimate issue essential to the verdict must be unanimous. However, the determination of historic facts presents a different question, and where alternative findings of historic facts are advanced in support of a single conclusion the better rule is that the jurors need not agree on any single alternative fact provided they all agree on some alternative fact that leads them to a single conclusion on the ultimate issue. For example, in an action for damages arising out of an automobile accident, the jury must be unanimous in its finding on the ultimate questions of duty, breach, causation and damages, and of course on the verdict. Still the jurors need not agree on the historic facts supporting their common conclusion on an ultimate question. If the plaintiff has advanced alternative theories of negligence, e.g. the defendant was speeding, failed to keep a proper lookout, or failed to

sound his horn, the jurors may be unanimous in their conclusion that the defendant was negligent, but for different reasons. The Supreme Court of Illinois, writing nearly a century ago, stated the applicable law succinctly:

> The common law requires that verdicts shall be the declaration of the unanimous judgment of the 12 jurors. Upon all matters which they are required to find, they must be agreed. But it has never been held that they must all reach their conclusions in the same way and by the same method of reasoning.... To require unanimity ... not only in the result, but also in each of the successive steps leading to such result, would be practically destructive of the entire system of jury trials.
> Chicago & N.W. Ry. Co. v. Dunleavy, 129 Ill. 132, 22 N.E. 15, 17-18 (1889).

The Court of Special Appeals acknowledged the applicability of this principle to criminal prosecutions in Craddock v. State, 64 Md. App. 269, 278, 494 A.2d 971, cert. denied, 304 Md. 297 (1985):

> Generally, jurors are not required to uniformly accept all of the evidence presented in order to arrive at a unanimous verdict. Some jurors unquestionably reject evidence that others accept in determining guilt or innocence. In short, the law requires unanimity only in the verdict, not in the rationale upon which the verdict is based. In the case sub judice, the statute sets forth various acts that constitute the crime of theft. As long as jurors unanimously agree that theft in some form was committed, nothing more is required.

Compare U.S. v. Gipson, 553 F.2d 453 (5th Cir. 1977). See also

State v. Smith, 136 Ariz. 273, 665 P.2d 995 (1983), (where jurors are unanimous in finding first degree murder they need not agree on whether it was premeditated or felony murder); Blake v. State, supra, (if a verdict may be justified upon either of two interpretations of the evidence the verdict cannot be impeached by showing that a part of the jury proceeded upon one interpretation and part upon another); Clark v. Commonwealth, supra, (aggravating circumstances are treated as a single unit and jurors need not specify which portion of the unit they find in order to satisfy requirement of unanimity); State v. Lomagro, 113 Wis.2d 582, 335 N.W.2d 583 (1983) (where a single crime is charged, jury unanimity on the particular alternative means of committing the crime is not required if the acts are conceptually similar); State v. Carey, 42 Wash. App. 840, 714 P.2d 708 (1986) (jurors need not be unanimous on determination of premeditated or felony murder so long as they are unanimous that one or both have been proved). Contra, State v. Kirkley, supra, 302 S.E.2d at 157 (jury must unanimously agree that a mitigating circumstance exists before it may be considered).

Although the question of unanimity may arise in connection with instructions to be given in cases where a general verdict is to be returned, the problem will be seen more frequently where the case is submitted to the jury on

special verdicts or interrogatories. As Dean McCormick pointed out in his article, Jury Verdicts Upon Special Questions in Civil Cases, 2 F.R.D. 176 (1941), the impetus in several states for resort to special questions may have been to provide a check on jury nullification of the law, and in some cases to avoid tedious instructions on the law. Dean McCormick concluded that submission on special questions had worked well where a few ultimate questions stated in simple form were submitted, but that submission on multiple subordinate facts and issues had caused difficulty.[5]

The particular problems of jury unanimity in cases involving special verdicts is also discussed by Professor Ruth Ginsburg in Special Findings and Jury Unanimity in the Federal Courts, 65 Colum.L.Rev. 256 (1965). As Professor Ginsburg cogently observes, the definition of what constitutes an "ultimate question" and the precise formulation of the question to be put to the jury are matters of considerable importance.

> [W]hen separate fact allegations, each supported by evidence, would independently permit the jury to reach a conclusion on an ultimate issue, appropriate definition of the elements of the case on which the jury must agree poses a problem of more than academic significance. In close cases, the chance of a verdict for one side or the other may be enhanced or restricted depending upon the

---

5 Additional problems resulting from the failure of one or more jurors to join in the answer to a special interrogatory or special verdict are collected in an annotation, Annot., Failure To Join In Special Verdict, 155 A.L.R. 586 (1945).

> detail or the generality of the propositions upon which agreement is required. Id. at 262.

After discussing two alternatives to a proper definition of the requirement of unanimity, Professor Ginsburg concludes:

> A definition of unanimity in terms of particular facts corresponds to a theoretical image of the jury as a singular body--twelve men who, through the alchemy of the deliberative process, become as one. In reality, however, perfect harmony, even if it were desirable, is not to be anticipated. A formal requirement of accord on independent particulars, each of which standing alone would support an ultimate finding, impels formal agreement. If each juror subscribes to at least one of the independent particulars, but no particular is subscribed to by all, it seems improbable that the jury would--and out of tune with common-sense notions of justice that the jury should--report itself "hung" rather than proceed to decision. In such a case, if particular fact questions were submitted to the jurors, agreement to answer the "right way" by reporting unanimity on one or more of the particulars would be the more likely course.
>
> The alternative definition--unanimity upon ultimate issues--appears the more desirable. It takes into account the collective nature of the jury and does not purport to carry the image of a composite individual beyond practical limits. In short, unanimity defined in terms of ultimate issues strikes a balance between two extremes: failure to define the objects of unanimity and "particular fact" definition. The latter, rigidly and unrealistically, equates the collective judgment of twelve with the individual judgment of a single trier. The former, although it would provide maximum leeway for the "equitable dispensing power" of the jury as a palliative for archaic rules of law, would also constitute an abdication of the judicial function. Id. at 268 (footnotes omitted).

Having concluded that the requirement of unanimity is properly applied to the ultimate questions presented by a given case, I turn to the more specific problem of what constitutes the ultimate question or questions in a capital sentencing proceeding. The absolute ultimate question is, of course, whether death is the appropriate penalty. To reach that question the jury must determine whether one or more of the statutory enumerated aggravated circumstances exist in the case. If one or more aggravating circumstances are found to exist, the jury must determine whether one or more relevant mitigating circumstances exist. The verdict is then determined by the jury weighing the aggravating against the mitigating circumstances and determining whether, by a preponderance of the evidence, the aggravating outweigh the mitigating.

Clearly, the ultimate verdict must be unanimous. In addition, I entertain no doubt that the jurors must be unanimous in their determination that one or more enumerated aggravating circumstances have been proven to exist. As noted earlier, I am not persuaded that there is a constitutional requirement that all jurors agree as to the existence of <u>each</u> aggravating circumstance to be considered, but that question is not before us. The Legislature has imposed that requirement by statute, and the requirement does not in any way contravene rights of the defendant.

Not quite as clear, but acceptable to me for the purposes of this case, is the proposition that in order to engage in the ultimate weighing process each juror must determine that one or more relevant mitigating circumstances exist.[6] I do not agree, however, that the Legislature may constitutionally require unanimity as to each individual mitigating circumstance before it may be given consideration in the final weighing process. As I have taken some pains to point out, this is a position that extends the requirement of unanimity beyond the ultimate question of whether all jurors believe some relevant mitigating circumstance or circumstances exist, and therefore it is out of step with currently accepted principles of law. More important, however, the requirement may mechanically exclude from consideration by the jury substantial historical facts and mitigating circumstances that might well tip the balance in the

---

6 A strong argument can be made that even in the absence of a finding that one or more mitigating circumstances exist, the jury must be free to reject the sanction of death as the appropriate penalty. The rationale is that although an aggravating circumstance determined by the Legislature to be sufficient to support the the penalty of death has been proven, the jurors may agree that the facts of the particular offense are not so egregious as to warrant imposition of the death penalty in a particular case. I agree that this option must be open to the jury, but I conclude that it is under Maryland death sentencing proceedings, and that the problem is one of semantics. Where twelve jurors agree that the circumstances of the offense, although crossing the legal threshold so as to justify consideration of the death penalty, do not in fact warrant death in the particular case, that jury has in fact found a mitigating circumstance even though it may be difficult to articulate. Trial judges and counsel should make this clear to the jury through appropriate instructions and argument.

final weighing process, and thus it is constitutionally infirm. Unfortunately, our Legislature has imposed precisely that requirement. Read together, subsections (i) and (j) of § 413 require a written determination by the jury, stating "specifically ... [w]hich, if any, mitigating circumstances it finds to exist."

Returning to the original hypothetical situation, if six jurors believe one mitigating circumstance has been proven to exist and six others believe another has been proven to exist, under the procedure followed in this case none of them can consider either mitigating circumstance in the final weighing process. Indeed, no matter how many jurors believe how many mitigating circumstances exist, no one will be allowed to consider any of them unless all twelve happen to agree on a single one. Nor does the presence of a "catchall" provision cure the deficiency, at least as it appears in the statute and the rule. After listing seven mitigating factors the jury should consider, subsection (g)(8) of the statute adds "[a]ny other facts which the jury ... specifically sets forth in writing that it finds as mitigating circumstances in the case." (emphasis added). Manifestly, this language excludes the possibility that individual judgments concerning the seven circumstances previously considered could somehow be worked into this section. Moreover, by requiring in the same format that the jury state specifically and in writing any other facts

that it finds as mitigating circumstances, the statute and rule perpetuate the requirement for specific unanimity as to historical facts rather than unanimity on the collective existence of relevant mitigating circumstances.[7]

I appreciate the fact that entirely legitimate concerns about the need to impose limitations on "unbridled discretion" and the need to provide as much information as possible for proportionality review have prompted the extraordinary requirements for precision and written findings. But we have gone too far. In an attempt to cure one problem we have caused another--not, as we have seen, an unusual occurrence in the difficult process of reaching an acceptable middle ground between important but conflicting interests in this area of the law. The process must be as simple and as fair as we can make it. We must be strict in the requirement that no person be considered for the death penalty unless and until there has

---

7 One could argue that there is nothing to stop a jury from writing in as a "catchall" mitigating circumstance that "we unanimiously conclude from a consideration of the aggravating and mitigating circumstances disclosed by the evidence that death is not the appropriate penalty" or words to that effect. The difficulty is that the form and the statute direct the jurors away from, instead of toward that type of determination. In the absence of a specific instruction from the judge informing the jury that they would be permitted to make such an entry if they so found, I have no confidence that the jury could reach that conclusion on its own.

been a unanimous finding, beyond a reasonable doubt, of the existence of one or more statutory enumerated aggravating circumstances. But we must be liberal in allowing the jury to consider evidence of any relevant mitigating circumstance and in allowing every juror to utilize in the ultimate weighing process every mitigating circumstance proved by a preponderance of the evidence satisfactory to that juror. If any individual juror is not persuaded of the existence of any relevant mitigating circumstance, there will of course be no weighing of circumstances, and the verdict will either be death, or the jurors will be unable to agree. However, if all twelve jurors believe there are mitigating circumstances, the ultimate weighing process must be allowed to take place.

To briefly summarize the foregoing discussion, I conclude as follows. First, that the statute requires and the Legislature intended to require as a condition precedent to the consideration of any aggravating or mitigating circumstance, the unanimous agreement of the jurors as to the existence of that circumstance. Second, that the statute does not require, nor did the Legislature intend to require, any finding by the jury that a particular circumstance does not exist, either unanimously or otherwise. Third, that because of the imposition of an artificial and wholly unnecessary requirement of unanimity as to each mitigating circumstance, the statute unconstitutionally precludes jury consideration of relevant collective mitigating circumstances.

Applying these principles to the case before us persuades me that the sentence of death must be reversed. It is entirely possible, and indeed I suggest very probable, that this jury answered "no" as to certain aggravating and mitigating circumstances because they were not unanimous in their belief that the circumstance had been proven to exist, and not because they unanimously agreed that it did not exist. The trial judge's instructions were entirely consistent with the interpretation of the statute that I believe to have been intended by the Legislature. After referring to the sentencing form that had been distributed to the jurors, and discussing the requirement of unanimity with respect to a finding of the existence of aggravating circumstances, the trial judge said:

> Let me, before we begin the enumeration of the items of aggravating circumstances, remind you that in order to answer any of those questions yes you must be unanimously satisfied beyond a reasonable doubt of the existence of one of those aggravating circumstances.

The judge then defined the burden of persuasion, and said:

> If, after consideration and comparison of the evidence you have heard this morning, you cannot find an abiding conviction to a moral certainty of the existence of an aggravating circumstance, then reasonable doubt does exist and you must answer no.

The trial judge then pointed out that the State had given notice only as to aggravating circumstance number two, and he said:

> Now in considering these matters, you must consider whether aggravating circumstance number two has been proven beyond a reasonable doubt. If you unanimously conclude that it has been so proven, you should answer that question yes. If you are not so satisfied, then of course you must answer no. (emphasis added).

Concerning the requirement of unanimity with respect to the existence of mitigating circumstances, the trial judge instructed in the language of the form that was before the jury.

If, as I suspect, the jury followed logic and the trial judge's instructions rather than the strained interpretation of the meaning of a "no" vote put forth by the majority, it follows that a number of the jurors may have been persuaded of the existence of certain mitigating circumstances, but agreed to marking them "no" because the jury did not unanimously find their existence. Moreover, because the trial judge instructed in accordance with the statute, there was no opportunity for the jurors to incorporate within the "catchall" section any individual judgments they may have reached concerning the enumerated mitigating circumstances. Judge Sharer instructed them:

> Now number eight indicates, other mitigating circumstances exist as set forth below. Should you find any other mitigating circumstances not specifically enumerated in the first seven that we have just reviewed which have been raised by the evidence and proved to you by a preponderance of that evidence you may so indicate.... If you find no other mitigating circumstances then you make no entry upon those lines under number eight. (emphasis added).

The jury unanimously found one aggravating circumstance to exist, but was unable to agree unanimously on the existence of any particular mitigating circumstance.[8]

Thus, the hypothetical posed by Appellant comes to life. This jury was precluded from a consideration of mitigating circumstances that should have been permitted. It was precluded from engaging in any weighing of aggravating and mitigating factors by the draconian instruction that "if Section II was completed and all of the answers were marked "no" then enter "Death."

The majority's conclusion that when the jury answers "no" it means that every juror agrees that the circumstance in question does not exist (or perhaps more precisely, that every juror agrees the circumstance has not been proven to exist by the requisite standard of persuasion) solves the problem of mandatoriness--if every answer with respect to mitigating circumstances is "no" there cannot be a single juror who believes that a single mitigating circumstance exists. But this poses another problem. If "yes" means all jurors agree that the circumstance does exist, and "no" means all jurors agree that the circumstance does not exist, what is to happen when there is disagreement? According to the interpretation

---

8 The possibility that the jury could have fashioned some type of collective mitigating circumstance under the "catchall" provision was further diminished by the trial judge's instruction that if the jurors found any "other" mitigating circumstances, they "must write them in the space provided and number them so that they may be distinguished one from the other."

I favor, if the disagreement cannot be resolved the circumstance has not been unanimously proven and the jury marks "no" and moves on. But according to the majority, the jury could not answer "yes" or "no," and it would seem the result would be a mistrial. Given the number of aggravating and mitigating circumstances that may be considered, and the improbability that twelve persons could unanimously agree as to the existence or non-existence of each, the likelihood of a mistrial under that interpretation would be quite high. To avoid that result, which I agree would be unfortunate, the majority simply announces that when the jurors disagree, they do not answer "yes" or "no" but rather leave the answer blank and proceed to the next question.

Apart from the fact that this holding appears out of the blue after nearly ten years of extensive litigation involving this statute[9], it is inconsistent with the majority's basic premise that the existence or non-existence of aggravating and mitigating circumstances are <u>ultimate</u> facts requiring unanimity for resolution, and without the resolution of which a mistrial must be declared. I quote from the

---

9 I have examined the sentencing forms that were completed in twenty-five previous capital cases in which the death penalty was imposed and I have not found a single instance in which the answer as to the existence of aggravating or mitigating circumstances was left blank.

majority opinion, at [slip opinion p. 32]:

> [T]he presence or absence of aggravating and mitigating circumstances, and the weighing of aggravating against mitigating circumstances, all fall into the category of "ultimate issues."
>
> * * * *
>
> The cases regularly point out that unanimity is required for a jury determination on either side of an issue, ... and that the failure to achieve unanimity on either side of an issue ordinarily results in a hung jury.

One cannot simultaneously run with the hare and hunt with the hounds. Either a mitigating circumstance is an ultimate fact requiring unanimous concurrence as to existence before it can be considered, or it is a predicate or historic fact not saddled with the requirement of unanimity as to its existence.

Although we are poles apart in analysis, the majority and I are in essential agreement as to the basic principles of law that control in a capital sentencing proceeding. An aggravating circumstance can be found to exist only by unanimous agreement of the jury, and no aggravating circumstance may be considered unless it has been found to exist. A mitigating circumstance, on the other hand, must be considered by each juror who believes it to have been proven to exist, irrespective of whether all jurors agree that it exists. Where any individual juror believes a mitigating circumstance exists, that juror must consider that circumstance

whether or not it appears on the sentencing form in any of the eight categories. Where one or more aggravating circumstances have unanimously been proven to exist, each juror who believes a mitigating circumstance exists must weigh the aggravating against the mitigating circumstances, and may not vote for death unless persuaded that the aggravating outweigh the mitigating.

I would vacate the sentence of death, however, because the jury in this case was not informed, by instruction or by the sentencing form, of the interpretation of the statute announced for the first time today. The jurors may well have believed their answer of "no" meant that they could not unanimously agree that a mitigating circumstance had been proven. Never were they told that if they disagreed, they could leave the answer blank and proceed. Instead, they were told that "[y]ou must answer yes or no as to each of those circumstances."

I need not address the question of whether our death penalty statute, as rewritten by this Court in this case and in Foster v. State, 304 Md. 439, 499 A.2d 1236 (1985), cert. denied, U.S. , 106 S.Ct. 3310, 92 L.Ed.2d 725 (1986), may be constitutionally applied. Trial judges would do well, however, to instruct in accordance with the principles developed by the cases, and avoid instructing in the literal language of the statute. Additionally, this Court should

promptly revise Rule 4-343 to correct the sentencing determination form.

I would affirm the conviction, but vacate the sentence of death and remand the case for a new sentencing proceeding.

ORIGINAL

RECEIVED
NOV -5 1987
OFFICE OF THE CLERK
SUPREME COURT, U.S.

RALPH MILLS	*	IN THE
Petitioner	*	SUPREME COURT
v.	*	OF THE UNITED STATES
STATE OF MARYLAND	*	October Term, 1987
Respondent	*	No. 87-5367

* * * * * * *

ANSWER TO PETITION FOR WRIT OF CERTIORARI

The State of Maryland, Respondent, by its attorneys, J. Joseph Curran, Jr., Attorney General of Maryland, and Richard B. Rosenblatt, Assistant Attorney General, in answer to the petition for writ of certiorari filed herein, states that the writ should be denied, further review being neither desirable nor in the public interest.

QUESTIONS PRESENTED

1. Whether the interpretation of the Maryland capital punishment statute is a question of State law inappropriate for review by this Court?

2. Whether the Maryland capital punishment statute adequately permits the consideration of evidence in mitigation so as to preclude a finding that the statute is unconstitutionally mandatory?

3. Assuming that this Court elects not to reconsider its decision on the admissibility of victim impact evidence, whether the Maryland Court of Appeals properly determined that reversal based upon the introduction of victim impact evidence was not required?

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case.

REASONS FOR DENYING THE WRIT

I. and II.

NEITHER THE INTERPRETATION OF THE MARYLAND CAPITAL PUNISHMENT STATUTE, NOR THE ALLEGATION THAT THE STATUTE IS MANDATORY WARRANTS REVIEW BY THIS COURT.

Petitioner does not contend, as he cannot, that there is any restriction in the Maryland capital punishment statute to preclude the introduction of evidence in mitigation of sentence. Instead, Petitioner asserts that where there is a lack of unanimity, the application of the statute is unconstitutionally mandatory because a sentencing jury must unanimously agree that at least one mitigating circumstance is present before a balancing process is triggered. Petitioner is in error for two separate reasons: (1) the type of "mandatoriness" asserted by Petitioner resulting from the rejection of all mitigating factors as matters of fact is not the type of "mandatory" penalty proscribed by the decisions of this Court; and (2) the finding of a mitigating factor by a single juror can preclude the imposition of a death sentence without unanimity under the Maryland capital punishment scheme. As a result, there is no constitutional infirmity, and review should be denied.

In Woodson v. North Carolina, 428 U.S. 280 (1976), this Court found unconstitutional a North Carolina statute that punished all first degree murder with death. Thus, the "mandatory" statute held unconstitutional in that case required an automatic death sentence whenever a first degree murder

conviction was obtained. This Court found one of the statute's constitutional shortcomings to be the failure to allow "the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." 428 U.S. at 303. Recently, this Court again rejected a death penalty statute that did not permit the consideration of the individual characteristics of the crime and the defendant, even for the narrow class of murders committed by persons then serving sentences of life without the possibility of parole. Sumner v. Shuman, ___ U.S. ___, 97 L.Ed.2d 56 (1987).

This Court has consistently taken the position that in capital punishment cases, the right to an individualized sentence is not an empty guarantee. Thus, in Lockett v. Ohio, 438 U.S. 586 (1978), a death sentence was vacated because the statute under which it was imposed critically limited the range of mitigating circumstances that could be considered by the sentencer in determining whether death was appropriate. A similar legal restriction on the consideration of evidence in mitigation was found to require the vacating of the death sentence in Eddings v. Oklahoma, 455 U.S. 104 (1982). In Eddings, the sentencing judge stated that he could not "consider the fact of this young man's violent background." 455 U.S. at 113. The Oklahoma appellate court concurred, reasoning that evidence in mitigation was limited to that "which would tend to support a legal excuse from criminal liability." Id. In reversing, this Court stated:

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.

Id. at 113-14 (emphasis in original).

Applying these concepts to the instant case, it is clear that there was no constitutional infirmity in Petitioner's sentencing proceeding. Certainly, a death sentence was not automatically to be imposed upon conviction for the murder as in Woodson or Shuman. Moreover, under the Maryland Court of Appeals' interpretation of the statute, there was no limitation on the consideration of evidence. The Maryland Court of Appeals has interpreted the Maryland statute to the benefit of the defendants such that "no" is to be marked only where there has been a unanimous rejection of the particular mitigating factor. If there is a lack of unanimity on both "yes" and "no," both are to be left blank and a weighing process is to be undertaken. Thus, it is only where each mitigating factor is unanimously rejected that no weighing occurs and the sentence is "automatically" death. Certainly, under this interpretation, there is no unconstitutional restriction on the consideration of evidence in mitigation.

Relying upon "human experience", Petitioner asserts that no sentencing jury prior to the decision in this case was aware that it could leave the "yes" and "no" blank for a particular mitigating circumstance and proceed to the weighing function. As a result, Petitioner claims the State may not seek solace from this interpretation. However, assuming that the jury was unaware

that it could leave a finding with respect to a particular mitigating factor unresolved, the result would be a hung jury. It is inconceivable that a juror who would have found that a mitigating factor had been demonstrated would simply surrender his belief and affix his signature in agreement with a sentence of death. Under Maryland law, if a jury is unable to agree within a reasonable period of time, the sentence to be imposed is life. Md.Ann.Code, art. 27, §413(k)(2). Thus, the alleged ignorance of the jury cannot benefit Petitioner.

Moreover, even if the Maryland Court of Appeals' interpretation is rejected and Petitioner's interpretation adopted, there is no constitutional infirmity as no restriction was imposed upon the consideration of evidence in mitigation as a matter of law, as in Lockett (statute) or Eddings (judicial interpretation). Instead, the instant case presents a situation where the sentencer, after a full and fair consideration, rejects a mitigating factor as a matter of fact. Under the Maryland scheme, mitigating factors are much like affirmative defenses. This Court has acknowledged that a defendant may be required to shoulder a burden of proof on an affirmative defense. Patterson v. New York, 432 U.S. 197 (1977); Martin v. Ohio, ___ U.S. ___, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987). In the case of an affirmative defense, where the case is tried to a jury, the unanimity requirement applies. The failure of a jury to find that the affirmative defense has been shown is not synonymous with precluding consideration of the defense as a matter of law; it is simply a rejection as a matter of fact. The same situation

is present here. As a result, Lockett and Eddings are not offended by the "mandatory" imposition of a death sentence where no mitigating factors have been demonstrated by a preponderance of the evidence to the unanimous satisfaction of the sentencer.

Under the above rationale, the Constitution is not offended regardless of the interpretation of Maryland law. Whether a jury marks "no" because the jury unanimously believes that a particular mitigating factor has not been established, or whether the jury marks "no" because of a lack of unanimity on "yes" (whether the mitigating factor had been established), there is still no constitutional restriction on the consideration of mitigation evidence that would run afoul of Lockett and Eddings.

The interpretation of a state law generally is a matter on which this Court will not intervene. It is only in those circumstances where the State court interpretation appears to be an "obvious subterfuge to evade consideration of a federal issue that this Court will intervene." Mullaney v. Wilbur, 421 U.S. 684, 691 n.11 (1975). A review of the decision of the Maryland Court of Appeals reflects no such subterfuge to evade consideration of any federal issue. As a result, the interpretation of the statute by the Court of Appeals must be given due consideration, and under that interpretation, there is clearly no constitutional deficiency. Moreover, even if the interpretation by the Maryland court is rejected, and the interpretation urged by Petitioner of Maryland law adopted, there remains no restriction on the consideration of evidence in mitigation and, thus, no need

for additional review. Under these circumstances, the petition for writ of certiorari should be denied.

III.

REVERSAL IS UNWARRANTED ON THE BASIS OF THE INTRODUCTION OF EVIDENCE CONCERNING THE VICTIM.

The State of Maryland continues to submit that the introduction of evidence in the form of the impact of the crime on the victim is a proper "circumstance of the crime" relevant to a sentencer's determination of whether the sentence for a murder should be life or death. The State of Maryland urges this Court to reconsider in this case the holding of Booth v. Maryland, ___ U.S. ___, 96 L.Ed.2d 440 (1987).

Alternatively, the State submits that the Maryland Court of Appeals was correct in holding that the introduction of evidence concerning the character of the victim did not warrant the setting aside of the death penalty in this case. Unlike Booth, no evidence was introduced in this case concerning the overflow impact of the death on members of the family. Instead, the evidence was limited to the character of the victim. While the impact on a victim's family may be of questionable relevance, evidence limited to the character of the victim is not so irrelevant.

Further, although the issue was considered by the Maryland Court of Appeals sua sponte, the court did note that there was no objection raised at the sentencing to the introduction of the evidence, and no issue concerning the propriety of introducing the evidence was raised on appeal. The importance of full

briefing and argument becomes evident when the totality of the circumstances are considered. Assuming that the introduction of the evidence was inconsistent with Booth, such error was undoubtedly harmless. As noted above, any prejudice was minimized by limiting the evidence to the character of the victim and not the overflow impact on the victim's family. Moreover, as this Court noted in Booth, 96 L.Ed.2d at 449, victim impact evidence is not relevant to any particular aggravating or mitigating circumstance. Indeed, as the State argued in Booth, it is a circumstance of the crime relevant only in the weighing process. However, here, there was no weighing process as no mitigating factors were found. Inasmuch as the jury in this case considered only whether an aggravating factor was present, and whether any mitigating factors were present, and did not conduct any type of weighing, there could have been no consideration of the evidence concerning the victim's character, and thus no basis for reversal. Under these circumstances, review by this Court is unwarranted, except for the purpose of reconsidering the decision rendered in Booth v. Maryland, supra.

(4)

Supreme Court, U.S.
FILED
JAN 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-5367

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RALPH MILLS,

Petitioner

v.

STATE OF MARYLAND,

Respondent

On Writ of Certiorari to the Court of Appeals of Maryland

JOINT APPENDIX

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

GARY E. BAIR
Assistant Attorney General

RICHARD B. ROSENBLATT *
Assistant Attorney General
The Munsey Building
7 North Calvert Street
Baltimore, Maryland 21202
(301) 576-6410
Counsel for Respondent

ALAN H. MURRELL
Public Defender of Maryland

GEORGE E. BURNS, JR.*
Assistant Public Defender

MICHAEL R. BRAUDES
Assistant Public Defender

MARK COLVIN
Assistant Public Defender

JULIA DOYLE BERNHARDT
Assistant Public Defender

JOSE FELIPE ANDERSON
Assistant Public Defender
201 St. Paul Place
Baltimore, Maryland 21202
(301) 333-4842
Counsel for Petitioner

* Counsel of Record

PETITION FOR CERTIORARI FILED AUGUST 18, 1987
CERTIORARI GRANTED DECEMBER 7, 1987

1745

TABLE OF CONTENTS

	Page
Docket Entries	1
Transcript of Proceedings of March 5, 1985 (Sentencing Hearing)	4
Findings and Sentencing Determination Form	99
Report of Trial Judge	105
Opinion of the Court of Appeals of Maryland, *Mills v. State*, 310 Md. 33, 527 A.2d 3 (1987)	109
Order of the Supreme Court of the United States granting certiorari and leave to proceed *in forma pauperis*, December 7, 1987	172

IN THE CIRCUIT COURT
FOR ALLEGANY COUNTY, MARYLAND

RELEVANT DOCKET ENTRIES

Date	Proceedings
1984 November 16"	Record received from the Circuit Court for Washington County: Charge: First Degree Murder Presentment-Indictment-State's Automatic Discovery and Request for Discovery. Warrant Issued - Writ of Habeas Corpus Ad Prosequendum - District Court #11-2 documents Order of Removal (Judge Wright) dated October 18, 1984 Case transferred to Allegany County.
1984 December 13"	Motion to Individually Voir Dire all Potential Jurors. Motion to preclude State from arguing issues of parole to the Jury. Motion to Suppress. Motion for a Bifurcated Trial. Motion to Examine all evidence in the possession or control of the State. Motion to Dismiss State's Election to seek the death penalty as violative of the due process and equal protection clauses of the United States Constitution. Motion to bar imposition of Death Penalty Motion to compel State to reveal procedure by which it elects to seek the Death Penalty. Motion to allow Death Penalty Statistics to become part of the record. Motion for Production of Witness Statements. Petition for Writ of Habeas Corpus Ad Testificandum.
1984 December 24"	State's Answer to: Motion to Individually Voir Dire all Potential Jurors. Motion to preclude State from arguing issues of parole to the Jury. Motion to

Date	Proceedings
	Suppress. Motion for Bifurcated Trial. Motion to examine all evidence in the possession or control of the State. Motion to dismiss State's Election to seek the Death Penalty as violative of the due process and equal protection clauses of the United State's Constitution. Motion to Bar Imposition of Death Penalty. Motion to Compel State to reveal procedure by which it elects to seek the Death Penalty. Motion to allow Death Penalty Statistics to become part of record. Motion for production of Witness Statements.
1985 January 7″	Motion for Neurological Evaluation. Petition for Writ of Habeas Corpus.
1985 January 8″	Order of Court (Judge Leasure) for Neurological Evaluation.
1985 January 9″	Answer to Motion for Neurological Evaluation.
1985 January 10″	Motion to Limit Testimony, Evidence and Statements of Counsel. Motion for additional peremptory challenges. Motion to house defendant at Allegany County Jail or other facility within Allegany County during trial. Dismissal of Motion for Bifurcated Trial. Motion for Selection of Separate Juries on the issues of guilt and punishment.
1985 January 16″	Amended Answer to Motion to Suppress.
1985 January 28″	Answer to Motion for Additional Peremptory challenges. Answer to Motion to house Defendant at the Allegany County Jail.
1985 February 4″	Answer to Motion to Limit Testimony, Evidence and Statements of Counsel.

Date	Proceedings
1985 February 15″	Motion to Produce Pre-Sentence Investigation. Hearing (Judge Sharer) on Motions. Held in Abeyance.
1985 February 22″	Memorandum and Order (Judge Sharer) on numerous pretrial Motions filed by the Defendant.
February 27, 1985-March 4, 1985—Trial	
1985 March 5″	Sentencing Determination. Trial (Judge Sharer).
1985 March 7″	Report of Trial Judge-Sentencing.
1985 March 11″	Receipt Acknowledged of Warrant and Order staying execution from Howard Lyles, Warden-Md. Penitentiary.
1985 March 11″	Order for Appeal from the conviction to the Court of Appeals of Maryland.
1985 April 1″	Notice of Appearance for Appeal & Notice to strike appearance of previously assigned Public Defenders.

DEATH PENALTY

IN THE CIRCUIT COURT
FOR ALLEGANY COUNTY, MARYLAND

No. 2609

Criminal Trials

STATE OF MARYLAND

v.

RALPH WILLIAM MILLS,
Defendant.

TRANSCRIPT OF PROCEEDINGS

(Sentencing)

Cumberland, Maryland

Tuesday, March 5, 1985

Before:

HONORABLE J. FREDERICK SHARER, Associate Judge,
and a Jury

* * * *

[S-2] PROCEEDINGS

(Jury not present upon convening.)

BY THE COURT: Counsel, do I understand that we have several matters to be resolved preliminarily before the Jury is returned?

MR. LONG: Yes, Your Honor.

BY THE COURT: Mr. Long.

MR. LONG: Your Honor, pursuant to our discussion in chambers, I would request that the Court advise the Defendant on the record of his opportunities this morn-

ing to call any witnesses that he would desire to for the purpose of this sentencing proceeding; and that he also be advised on the record of his right to testify or not to testify in his absolute discretion as he may see fit.

I would further at the time of the sentencing proceeding move to introduce all trial testimony and exhibits that were introduced and evidence that was heard during the course of the trial itself.

I would also finally further ask that. . . It is my understanding that Mrs. LaFage is going to be a witness for the Defense this morning and would ask that she be excluded during the State's portion of taking testimony, because there will be certain testimony that I believe it might be improper for her to hear.

I believe those are all the preliminary matters the [S-3] State has, Your Honor.

BY THE COURT: All right. With regard to the motion to exclude witnesses, of course, that would apply to all witnesses, both for the State and for the defendant. So I will instruct those persons who expect to be called as witnesses in this phase of this trial to leave the Courtroom, remain in the outer public hall until you are called to testify, and do not discuss your testimony either before giving it or after giving it until such time as the proceedings have been concluded.

Ma'am, if that motion is directed at you, I'll ask you then if you'll step out into the hall.

Are there any other persons who would fall within the State's motion?

MR. NORMAN: Yes, Your Honor, Arlene Grove. I'm not sure if she's here yet. The summons for her said 9:30 I believe.

BY THE COURT: Will you check Sheriff and see if she's here, and I'll instruct her also?

With regard to your motion regarding the introduction of Exhibits, of course that's a matter that you could do when the Jury is seated.

With regard to the rights of the Defendant, these proceedings. . . Mr. Mills, I'm sure your counsel had ad-

vised you, but in the event they have not, and even if they have, I [S-4] wish to advise you that the purpose of this proceeding today before the Jury as you have elected is to determine the punishment to be imposed as a result of the Jury having returned yesterday a verdict of guilty of murder in the first degree. You have elected, as is your right, to have the Jury to determine sentence. The Jury will be presented with the options of imposing sentence of life imprisonment or imposing the death penalty. You have the right at this hearing to introduce any evidence that you and your counsel feel is appropriate in mitigation of the imposition of the death penalty. I'm sure your counsel have advised you of the seven or eight specific categories of mitigating circumstances. And in addition the Jury can consider and find any other mitigating circumstance which is generated by the evidence.

At this hearing, you have the right to testify yourself if you wish. That is your choice. You cannot be compelled to testify. As in any other matter, you have the right of course to remain silent if you so choose.

And you also have the right, as your counsel have advised you I'm certain, to call any other witnesses to offer testimony as to matters which are relevant and probative in these proceedings. And you also have the right through counsel to introduce any other evidence other than testimony which is probative and relevant to the issue of sentence.

Are you in a position at this time to state, [S-5] Mr. Knight, whether or not your client intends to testify? It's not necessary that he do so at the moment.

MR. KNIGHT: We are not in a position at this moment, Your Honor.

BY THE COURT: Very well.

MR. KNIGHT: May I address the Court?

BY THE COURT: Yes, you may.

MR. KNIGHT: Your Honor, as to the motions regarding the State, it's our understanding that Exhibit No. 17, which has never been formally introduced, and

one other exhibit number. . . What. . . Mr. Clerk, do you know?

BY THE COURT: There are two exhibits which have been marked but not introduced. And of course the State's motion would not go . . . or I would not permit the State's introduction of trial exhibits to go to those exhibits. If either the State or the Defendant wishes to introduce those, of course that's your respective options at this time. But they would not be included in the State's intention to introduce trial exhibits.

MR. KNIGHT: Your Honor, it would be 14 and 17. Is that correct, Mr. Clerk?

BY THE CLERK: 14 was not admitted, and 17 was only identified.

BY THE COURT: And they've been laid aside and segregated from the exhibits which have come in during the [S-6] guilt phase of the trial.

MR. KNIGHT: Thank you, Your Honor. The Defense at this time, Your Honor, would respectfully move this Court to have the Section 413 of Article 27 of the Annotated Code of Maryland, Supplement Volume 3A, 1984, Cumulative Supplement, which outlines Section 413, and Section 413 itself, to be copied or photocopied and have the Jury be given a copy of that Section of the law. That is the Section in the 1984 Cumulative Supplement, Section 413.

BY THE COURT: All right. I will deny the motion, Mr. Knight, as I have indicated to you previously in our chambers conference on the subject. The jurors will each be provided with a form entitled Findings and Sentencing Determination, which has been prepared for them in strict compliance with the . . . with Maryland Rule 4-343, and which is prepared in the precise language of the Rule. The language of the Rule of course tracks the language of the statute as to the Jury's determinations to aggravating circumstances, to mitigating circumstances, burdens of proof, and the balancing factors. The jurors will also be adequately instructed that the form

does in fact track both the Rule and the statute. They will also be instructed that in addition to the mitigating circumstances specifically set forth for their consideration they may determine other mitigating circumstances which might be generated by the evidence and add those if they wish to do [S-7] so. Having done all that, I believe that the Jury will be as fully informed of the statutory scheme as they need be and. . . But I would stop short of actually reproducing the . . . or photocopying the statute for their consideration. I believe that to be inappropriate.

MR. KNIGHT: Under G I believe, number eight in Section 413 of the Supplement, any other facts that the jury or the court may specifically set forth in writing that it finds as mitigating circumstances in the case, we would ask that we be allowed to mention that section to the Jury and indicate that they can in their own discretion develop a mitigating factor.

BY THE COURT: I believe that's appropriate.

MR. KNIGHT: Thank you, Your Honor.

BY THE COURT: Anything else from the Defense?

MR. KNIGHT: No sir, not at this point.

BY THE COURT: Anything else from the State?

MR. LONG: No, Your Honor.

BY THE COURT: Very well. Sheriff, bring the State's witness in so I can instruct her and then have the Bailiff bring the jurors down please.

MR. NORMAN: Your Honor, may we approach the bench?

BY THE COURT: Yes.

(Counsel and the Defendant approached the bench and the following ensued:)

MR. NORMAN: Your Honor, the second page of that [S-8] we've only used whiteout on it. It theoretically would be possible for somebody to scrape it away and read what's underneath.

BY THE COURT: Photocopies.

MR. NORMAN: That's possible, yes.

BY THE COURT: How many copies do you want?

MR. NORMAN: Two, Your Honor. Well three of them at least.

BY THE COURT: Okay. I'll have it photocopied. All right.

(Counsel and the Defendant returned to the trial tables and the following ensued:)

BY THE COURT: This is your witness. Her name is?

MR. NORMAN: Arlene Grove, Your Honor.

BY THE COURT: Ms. Grove, there has been made a motion to sequester witnesses. Which means until you're called to testify you must remain in the outer hall. You may not remain in the Courtroom. And during that time you should not discuss your testimony either before you give it or after you have given it with any of the other prospective witnesses in the case or anyone else. So if you'll remain in the hall until you are called.

(Jury called to Courtroom)

(Roll Call of jurors)

(Jury sworn)

[S-9] BY THE COURT: Ladies and gentlemen, the purpose of the proceedings today is to comply with the provisions of Maryland law which are applicable in cases in which the State has given its notice as required by law of its intention to seek the death penalty in certain cases in which the State is entitled to give that notice. Having returned a verdict yesterday of guilty of murder in the first degree, there then is required a separate sentencing phase. At his option, which is his alone, the Defendant has elected to have the sentencing phase of this trial conducted before a jury.

Now you are not and will not be merely called upon to apply your own opinion as to whether a sentence of life in prison or the death penalty should be imposed. Rather after hearing evidence from both the State and from the Defendant, you will be required to consider statutorily mandated circumstances, both aggravating circumstances and mitigating circumstances. You must make those decisions based upon the burden of proof as I define it for you, adhering absolutely to that burden of proof.

I will give to you at the time I instruct you more fully later on a form which has been prescribed by law, and which you are obligated to follow and to consider. In that form is set forth the . . . in order ten aggravating circumstances which the law permits you to consider. The State is required to prove any aggravating circumstance which it seeks to prove [S-10] by proof which convinces you beyond a reasonable doubt. And I will again at the end of the case define reasonable doubt for you. You will then consider if you find any aggravating circumstances beyond a reasonable doubt what the law sets forth to be mitigating circumstances, that is, circumstances which would favor the Defendant. In order to find mitigating circumstances, you must be satisfied only by a preponderance of the evidence.

Should it be necessary for you to proceed, then you will be required, again keeping in mind the burden of proof which I defined for you, to balance those factors and reach a decision as to the sentence which you unanimously feel should be imposed. Again it is not merely an application of your own opinion but strict adherence to the statutory scheme which has been developed by the Legislature and approved by the Maryland Court of Appeals.

I, as I did at the outset of the initial phase, admonish you to maintain open minds, to listen carefully to all of the evidence presented by the State and on behalf of the Defendant. As in the earlier stage, counsel will have

the right to conduct arguments based upon the evidence and the law. And you will then be returned to the jury room to deliberate the sentence in this case. You should not form any opinions until such time as you are returned for the purpose of deliberation. Should we take any recesses, I encourage you [S-11] and advise you again not to discuss the . . . this phase of the case with each other, and do not permit anyone to discuss it with you.

All right, gentlemen, are we ready to go forward?

MR. LONG: Yes, Your Honor.

MR. STILLRICH: The Defense is ready, Your Honor.

BY THE COURT: Very well. Mr. Norman.

MR. NORMAN: May it please the Court.

Mr. Foreman, members of the Jury, good morning again.

As you have heard Judge Sharer tell you, we're here this morning to present evidence to you and to argue to you about what we consider . . . what the State and what the Defense considers to be the appropriate penalty in this case. Because of your finding of guilty of first degree murder yesterday, this is why we're here for the sentencing phase now.

I want to tell you a few things before the witnesses begin to testify from the stand. One of the things I'd like to mention to you is that it may have occurred to you over these days of listening to the evidence and of getting ready to be selected as jurors, it may have occurred to you . . . I'm sure it did . . . that you have not heard too much about the victim, Paul Robin Brown; that just about all of the testimony that you have heard has concerned what happened around the time that the murder happened, that the murder occurred. But you haven't heard that much about Paul Brown. And in particular, you [S-12] haven't heard anything about the victims of this murder. You haven't heard anything about his surviving relatives and how they feel.

Now under the law I can't call them to the stand. But under the law I can make available to you and you can inspect, you can read through the entire thing what's called a victim impact statement. And what this is essentially a letter. It's actually a summary of a conversation between the victim, Paul Brown's, surviving brother and his wife, who is Paul Brown's sister-in-law, and a lady who works with the State's Attorney's Office in Hagerstown, who is what is known as the victim witness coordinator. And she had a conversation with them about how they feel, about how Paul Brown's brother feels now that his brother is dead. And that's going to be something that you're going to have to consider when you're deciding what to do with the penalty in this case. And I believe there's no one who would question that that's right. Because for a long time the law in this country and the criminal justice system in this country was getting away from victims, and they were not being considered properly. And I want you to take that very seriously as everything else. I want you to include that in your deliberations when you're deciding what to do.

You're also going to be permitted to see a pre-sentence investigation. Because under the law as it stands, [S-13] one of the things that is admissible in this kind of a proceeding is any evidence concerning the Defendant's prior record. I'm not going to tell you what it is now, because you're going to be able to see it. And it's down in black and white.

You're also going to be permitted to refer back to the exhibits which you saw when you made your deliberations as to whether or not the Defendant was guilty. So if you need to refresh your memory about the facts of this case, you'll be allowed to do that.

Finally, I'd like to remind you that each and every one of you took an oath at the beginning of this trial that you would rule fairly on the evidence. And you also took an oath at the beginning of this trial even before the trial started in fact, that you had no strong

opinions one way or the other, or no strong feelings or convictions one way or the other based on any religious or moral grounds about the imposition of the death penalty. And that was a real serious question. And you will have noted that everyone was listening very carefully to what your answer was. I just wanted to remind you about that at this stage because when all the evidence is in I'm going to be coming to talk to you as a representative of the people of the State of Maryland, and as the only person available to talk for Paul Brown and his surviving relatives. And I'm going to be asking you to impose [S-14] the death penalty. So I'd just ask that you listen to the testimony from the witness stand and consider all the evidence fairly and then render judgment.

Thank you.

BY THE COURT: Mr. Stillrich.

MR. STILLRICH: Thank you, Your Honor.

Mr. Foreman, ladies and gentlemen of the Jury, Mr. Norman is right. As a result of the decision of murder in the first degree yesterday rendered by you, and the State proceeding under their election of an aggravating circumstance is seeking the death penalty in this case. For Mr. Mills, the Defendant, seated at the end of the table, this is the most important stage of the trial for him. At this point it doesn't matter whether he's guilty or innocent. He's already been found guilty, guilty by you yesterday. Now the decision is, does he live or die. That decision is yours and yours alone.

However, there are guidelines. You heard the Judge mention aggravating circumstances, mitigating factors. The burden is on the State to show aggravating circumstances beyond a reasonable doubt. The burden is on the Defendant to show mitigating factors by a preponderance of the evidence. The Judge will explain to you the difference between beyond a reasonable doubt and a preponderance of the evidence. To me preponderance of the evidence is fifty point zero, zero, zero, one. Not seventy-

five percent, not sixty percent, just fifty [S-15] point zero, an infinitestimal number of zeros with a one at the end.

You will hear the aggravating circumstances presented by the State. Mitigating factors you will hear evidence from the stand by the Defendant . . . the Defense as to the age of the Defendant, his background, his profile. His mother will testify over the years the problems she's had with Mr. Mills, the help she sought through State agencies, the rejection, the fact that he could not receive help or did not receive help. You will hear evidence to that. And we're going to ask you to consider those as mitigating factors by a preponderance of the evidence.

Also, most importantly, any other factors which might be mitigating that you as a Jury in and of itself can use as a mitigating factor in determining whether Mr. Mills should live or die.

The oath that you take or have taken, that was an oath to listen to the evidence. That was not an oath to kill. It was an oath to listen to the evidence, both the aggravating circumstances but most importantly mitigating factors. At the end of the evidence and the testimony, Mr. Knight I believe is going to be the one to make the closing argument for this phase of the trial, for the penalty phase. At this time he, as I am right now, is going to suggest that the mitigating factors do outweigh the aggravating circumstance by a [S-16] preponderance of the evidence, and we will be asking for a life imprisonment sentence.

Thank you.

BY THE COURT: Mr. Norman.

MR. NORMAN: Your Honor, at this time the State would request that the Court ask the Clerk to mark for identification the pre-sentence investigation done in this case, and the victim impact statement, and that both of those documents be made a part of the record in this matter.

BY THE COURT: Mr. Knight.

MR. KNIGHT: We have no objection, Your Honor. We have reviewed both documents.

BY THE COURT: Very well.

MR. KNIGHT: That's the . . . Excuse me, Your Honor, one moment. That is the Special Court investigation. Is that the caption on the document the State's moving in at this time?

BY THE COURT: That's my understanding.

MR. KNIGHT: And signed March 4th by the Cumberland office.

BY THE COURT: That's my understanding.

MR. KNIGHT: Is that correct?

MR. NORMAN: That is correct, Your Honor.

BY THE COURT: Very well.

(Presentence investigation and victim impact statement were [S-17] marked State's Exhibits S-1 and S-2 for identification and received in evidence.)

MR. NORMAN: Your Honor, also as a preliminary matter, the State would also move to have introduced for the purpose of this proceeding all of the exhibits and documents which were admitted by the Court at the guilt phase of this trial. And also, Your Honor, the Jury be instructed that all the testimony in the guilt stage of this trial also be admitted as part of this proceeding.

BY THE COURT: Any objection, Mr. Knight?

MR. KNIGHT: No, Your Honor.

BY THE COURT: Very well. All the matters then sought to be admitted by the State are admitted without objection.

(All State's Exhibits and all testimony in guilt phase of trial admitted into evidence in sentencing phase.)

MR. NORMAN: Your Honor, the State calls Colonel Harold Spickler to the witness stand.

HAROLD E. SPICKLER

a witness produced on call of the State, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

[S-18] BY MR. NORMAN:

BY THE CLERK: State your name and assignment to the Court please.

A My name is Harold E. Spickler. I'm the chief security at the Maryland Correctional Institution, Hagerstown, Maryland.

Q And, Colonel Spickler, that is your rank, Colonel, correct?

A That's correct.

Q How long have you been a correctional officer?

A Nineteen years.

Q And you stated that your position is chief of security, is that right?

A That's correct.

Q Does that include supervision of other correctional officers?

A Yes, it does. I have complete supervision of all correctional officers in the absence of the warden, deputy warden, I'm in charge of the institution.

Q Does that also include the recordskeeping department?

A All departments, including records.

Q Now, Colonel Spickler, did you bring certain documents with you to Court today?

A Yes sir, I did.

Q And what are those documents?

A The documents is the base file of David (sic) William [S-19] Mills.

Q You mean Ralph William Mills?

A Ralph William Mills, commitment number 165261.

Q Will you just explain to the Jury briefly what the base file is please?

A The base file is a file that is set up by the Department of Correction. It is set up when the individual enters the Department of Correction. It contains all documents regarding his progress through the department, medical documents, legal documents, disciplinary records, etc.

Q And, Colonel, are these records compiled and kept by the Division of Correction and also by the Maryland Correctional Institution in the ordinary course of business?

A Yes, they are.

Q And is it also a requirement that the Maryland Correctional Institution and of the Division of Correction that records such as that base file be compiled in the ordinary course of business?

A Yes, it is.

Q Are you acquainted with the manner in which those records are in fact compiled and kept?

A Yes, I am.

Q Would you please explain to the Jury?

A When an inmate enters the Department of Correction, a base file such as I have before me is set up. This file [S-20] contains all the information from individuals to the inmate, from the inmate to the Department of Correction, contains his fingerprints, photographs, medical records, some medical records. It's a really . . . It's a file that contains the progress of the inmate from the time he enters the Department of Correction till he leaves. Any place within the Department of Correction, whether he be transferred to another institution or other facility, the base file follows him, and the records are compiled at that institution the same as they would be at ours.

Q So these records would include documentation of an inmate's treatment and housing if, for example, he went to Clifton T. Perkins or Patuxent Institution?

A Yes sir, they would.

Q Is there in the base file, Colonel, a two page report filled out and signed by one Sidney J. Wolf, dated January 24, 1984?

A Yes sir, there is.

Q Would you please remove it from the file?

(Removed and handed)

Q Colonel Spickler, while the exhibit is being marked, does the base file include the record of the inmate's commitment record? I mean Ralph William Mills' commitment record?

A Yes sir, it does.

Q So then on August the 6th, 1984, was Ralph William [S-21] Mills in fact confined as an inmate of the Maryland Correctional Institution in Washington County, Maryland?

A Yes sir, he was.

Q I show you now what is marked for identification as State's Exhibit S-3. And is that the two page report filled out by Sidney J. Wolf that I asked you about earlier?

A Yes sir.

Q Did that record in fact a two page document in fact come from inmate Ralph William Mills' base file?

A Yes, it did.

Q And was it prepared in the ordinary course of business?

A It would have been, yes sir.

Q I show you now a photocopy of that report, which is marked for identification as State's Exhibit No. S-4, and ask you if it substantially other than certain deletions, if it substantially complies with the original? In other words, the question is, aside from certain deletions does it comply with the original?

A Yes sir, it does.

MR. NORMAN: Your Honor, at this time I ask that State's Exhibit for identification S-4 be admitted for the purpose of this proceeding in lieu of the original marked

State's Exhibit S-3 which is a part of the Division of Correction records.

[S-22] MR. STILLRICH: There's no objection, Your Honor.

BY THE COURT: Very well.

(Report marked State's Exhibit S-4 for identification was received in evidence.)

MR. NORMAN: No further questions at this time.

CROSS-EXAMINATION

BY MR. STILLRICH:

Q Colonel Spickler, you have the entire base file of the Defendant, Ralph William Mills?

A Yes sir, I do.

Q Does that base file reflect any type of treatment, psychological treatment, examinations or psychiatric treatment that Mr. Mills has received since he's been at the institution?

A At our institution?

Q Yes.

A There is several instances where he had talked to our psychologist.

Q What about a therapy program of any kind?

A No sir, there's nothing in that.

Q Any type of treatment program?

A No.

MR. STILLRICH: No further questions, Your Honor.

BY THE COURT: You may step down, sir.

MR. NORMAN: Nothing further. The State calls [S-23] Arlene Grove to the stand.

BY THE COURT: You may be subject to recall, Colonel. Please remain in the Court House. Do not discuss the testimony you have given with any of the other witnesses.

ARLENE GROVE

a witness produced on call of the State, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NORMAN:

BY THE CLERK: State your name and assignment to the Court please.

A Arlene Grove, pre-sentence investigator, Parole and Probation.

Q Miss Grove, you work for the State of Maryland, is that correct?

A Yes sir.

Q In fact for the Division of Parole and Probation?

A Yes sir.

Q How long have you worked in that position?

A Ten years.

Q So then in November of 1982, you were employed in your present job?

A Yes sir.

Q Did you have occasion in November of 1982 to prepare and complete a pre-sentence investigation on one Ralph William [S-24] Mills?

A Yes sir, I did.

Q And would I be correct in saying that that was as a result of Mr. Mills having been found guilty of second degree murder and robbery with a deadly weapon?

A He pled guilty. He wasn't found . . . He . . . Yes sir.

Q All right. But that is what the offenses were?

A Yes sir.

Q Now in the course of preparing your pre-sentence investigation, did you talk to the Defendant?

A Yes sir, I did.

Q Do you see him here in the Courtroom?

A Yes sir.

Q Would you point him out please?

A Sitting over there.

Q At the trial table?

A Yeah, the green shirt at the trial table.

Q All right. Did you also talk to any members of the Defendant's family when preparing this pre-sentence investigation?

A Yes sir, I did.

Q And who were they?

A I talked to his mother and his stepfather, Mr. and Mrs. LaFage, at their home.

Q And where is their home?

[S-25] A It's in east Baltimore near Patterson Park.

Q Now also in the course of preparing this pre-sentence investigation, did you carry out any inquiries as to what kind of institutionalization and treatment of the Defendant had existed in the past before you were assigned to the case?

A Yes sir, I did.

Q And what did you find out?

A Most of his records were kept in Juvenile Services, because till that time he was . . . he was seventeen, and his records had been kept there. He had been institutionalized since 1978 at various places, some under Social Services recommendation, and some under Court recommendation from Juvenile Services.

Q Do you have the names of the various places?

A Yes sir.

Q Will you please itemize them?

A October of '78, he went to the German Children's Home. It's a like an orphange kind of situation. It's for children that are troublesome but not necessarily . . . It's not . . . One doesn't go there as a Court referral. They're taken in because they're ungovernable or yielded to this place by the parents, or because they do not have parents. And this was at the recommendation of Social Services from the school, but also because there were two or three . . . there were three [S-26] Juvenile petitions

as well, so in a combined decision he was sent to the German Children's Home, but that . . . that's not to be construed as a commitment. This was a voluntary agreed to situation by the mother and stepfather.

Q The mother being Mrs. LaFage?

A Right. He was . . . While he was there, he was also technically under unsupervised probation from Juvenile Court, but because that was a residential center, that's why he was being considered unsupervised. He was in fact being totally supervised. At the home, he's given some group counseling. There are defined limits where he's supposed to stay. But there are not officially locks on the door and restraints to keep him in. It's that kind of a situation.

While he was at the German Children's Home, he continued to acquire juvenile petitions . . .

Q What do you mean by that?

A He was charged for other juvenile offenses in the neighborhood, breaking and enterings . . .

Q Well then he ultimately I take it left the German Children's Home?

A Yes, because of his not adjusting to their rules, he was no longer qualified to stay there. They could . . . Because they could not force him to stay. He was no longer their type of placement. He was released in July of '79. And the Juvenile Court System has the authority to commit to [S-27] Juvenile Services. The Court placed him under Juvenile Services commitment. Juvenile Services then committed him for placement to his own home, with his mother being his supervisor. So while he was under commitment to Juvenile Services, the placement was in his own home with Juvenile Services telling Mrs. LaFage various rules that he must live under, which were such as curfews and times that he had to be in, plus voluntary counselling at a mental health facility. And she was to follow through with those as she could.

That did not work out. There were more petitions. That would be the same as an adult arrest but as a

juvenile petitions are filed rather than arrests. The petitions were filed for breaking and entering, stealing. And at that point then in 1980, the following year, he was committed to Juvenile Services Administration with the Court telling Juvenile Services that they wanted him in the training center, the Maryland Training School for Boys.

Q And what is that?

A That's the securest form of juvenile punishment. That's confinement. The doors are locked. Rules are enforced by whatever measures they take to be enforced. Nevertheless, at the training school while the commitment continues officially, at the training school frequently weekend leaves and holiday leaves are given. And Mr. Mills was given these leaves to go home weekends or holidays. And during some of the weekend [S-28] leaves he would again accrue new petitions . . . new arrests, new charges while he was at home. He also eloped three times, AWOL, left without permission while at the training school. But he was under commitment from May of '80 through January 26th, '81.

Q Now just. . . I'm going to stop you here. So far you've talked about the German Children's Home and also about the Maryland Training School for Boys. What history, if any, do your records reflect of any type of counseling or treatment program in those two institutions which might have been afforded to the Defendant while he was there?

A Okay. From. . . Well backing up, prior to commit. . . You asked about where was he committed. Prior to his first commitment to the German Children's Home, he was in counseling, a mental health outpatient counseling situation the Eastern District Child Mental Health Services facility under a Dr. Fiametta (phonetically) from November '77 to October '78. This was the family was to bring him and counseling was afforded to the parents if they wanted it and to the child and so forth. The records reflect that Mrs. LaFage was not necessarily

regular about keeping these appointments and getting her son there. The records also reflect that sometimes she didn't do this because she was afraid of his acting out behavior when she insisted. So I'm not. . . The record reflects both sides of that.

[S-29] Q If you would, when telling the Jury about the commitments that this man has been through, I'd also appreciate it if you could at the same time tell them about any kind of treatment program or counseling sessions he might have been given under the commitment.

A Okay. I'm used to testifying in Baltimore City Where all of that is understood. It's hard to. . .

Q Okay.

A Okay. The. . . After the outpatient treatment for that year, which was not in a residential setting, then he went to the German Children's Home. And there there is group counseling; there is I wouldn't say exactly psychotherapy. It's one step less than that. There's one-on-one counseling, but it's not deep psychotherapy.

Q Okay. One-on-one counseling with who?

A Whoever the people are at the German Children's Home. I didn't get the name of the people there because that's not in Juvenile Services records. It's just. . .

Q But are they professionals?

A Yes. Professional staff members.

Q And also you said the group, he went through group counseling sessions. What does that entail?

A That's whoever the children are that are in a specified area of that unit, that ward, whatever it's called, are given chances to work with each, discuss things out when [S-30] they have conflicts or whatever, who said what to who, who threw the first spitball kind of thing, you know, to discuss why is there a problem here. It's an informal kind of thing trying to get compliance within the group with helping from one another. That kind of situation plus the one-on-one counseling at the German Children's Home. Those records are kept by the Department of Social Services and I did not have access to them

as part of this report. I just read a summation of that in Juvenile Services files.

He was evaluated by the Juvenile Court in January '78. Also evaluated in July of '79 at the request of the District . . . Juvenile Services . . . Juvenile Court, excuse me. And each of these evaluations were done in a counseling type session, trying to help him in addition to doing the evaluation. They were by different professionals as well.

Q Well after he left the German Children's Home, you stated he then went to the . . . some time later went to the Maryland Training School for Boys. Would you also tell the Jury about counseling and/or treatment sessions if any he received at the training school?

A Okay. That began in 1980. While he was there, the . . . what do they call it, the unit manager, the group leaders, the various staff members there use about five or six different forms of group therapy. They try small group, large groups. And they, as a person becomes better suited to one group, then [S-31] they move up to a better cottage and more privileges and that kind of thing. So they use positive reenforcement kind of things. And they try to make contracts with the students. If you do so and so, then this will happen by such and such date. So they try positive reenforcement. Group counseling. They do individual counseling, especially with somebody who's demonstrating acting out behavior, which means he's doing things that are hurting somebody else. He was afforded all of this.

There's noted in the record, it notes the improvement that he made as a result of the counseling, the one-on-one. He was given everything that they had.

Q What do you mean by that?

A He was. . . Okay. There are various levels of supervision even within the training school. There are the just holding for thirty days and then released and nothing hap. . . You know. Lou're just held for thirty days in a punishment kind of setting and there's very

little counseling. He was not in that kind of a situation. He was there for long term from initially a very poor adjustment to being released with the feeling that he'd improved greatly. So he had been through every level of their counseling and help.

Q And he was released for a school program in September of 1980, is that right?

A Let me see.

Q Referring to your original pre-sentence investigation [S-32] on page 6.

A Page 6. Oh, yes. That was when. . . Okay. Right.

Q And then. . .

A But he was released just for one week and acquired a new charge and then came back. While he was off for that one week, he was under after care. And they consider that. . . The terms are confusing. When someone is still under after care, which is like probation, they're back out in the community, they consider that still under commitment. So technically he was still under commitment, but he was out in the community for one week, hoping that that would work, and then during that week he acquired a Baltimore County case, and was returned and kept inside the institution rather than outside. But that was. . . The commitment continued.

Q And when returned to the Training School for Boys, did the treatment and counseling continue?

A Yes sir, it did.

Q Along with the commitment?

A Yes sir.

Q Some kind of treatment and counseling as had been administered before, or something else?

A No, the same progressive treatment.

Q So then in November of 1981 I believe that the Defendant was recommended for community release. .

A Right.

[S-33] Q . . . from the Training School, is that right?

A Well he was . . . Backing up just a little bit, he was out that one week in September of '80. He got into

trouble. Came back in later in September of '80. But by January of '81 they provided a very positive report that he had done well; he was getting along with people; and that he was ready to get out. Mr. Smith did rescind the order, and he was by Court then released. That means he really was no longer under the commitment. But he came right back in two weeks later with more charges. And from that point, February 3rd, '81 . . . He was released 1/19/81. He came back on February 3rd, '81. And from that point on he stayed until his release in . . .

Q In November '81?

A Right.

Q Now throughout this entire . . . Throughout all these commitments and treatment and counseling sessions, are you acquainted with what the objective of these commitments and treatment, counseling sessions was?

A Yes. Can I read some of this to be specific or not? I don't know if I'm allowed to.

Q Well I better see it first.

(Pause)

Q Basically if I understand the objective is one to try and rehabilitate the inmate, and to return him to his family. Is that basically correct?

[S-34] A Yes sir.

Q And that was the objective throughout all of these commitments and counseling sessions?

A Right. That's also the aim of the weekend releases. That's why they continued to give weekend releases, so the juvenile will not feel institutionalized. They will feel still a part of their family, be able to cope with family rules and regulations, and feel like they're accepted and a part of their family, not just a part of an institution.

Q In other words it's to try and correct their behavior but at the same time not make them feel like a convict?

A Yes sir.

Q So now we're up to November of 1981. And the Defendant you say was released from the Training School in that month, is that correct?

A Again he . . . the commitment was not rescinded. He was released Thanksgiving weekend of '81 as a holiday release. The holiday release went well according to the family, and so he was therefore allowed to stay out on December 2nd when he should have gone back, with the understanding that he was scheduled for Court on January 7th, '82. And at that time he would be formally considered for recision or the commitment was to be considered over as of January 7th, '82, but actually he was out on what's called aftercare or community release, actually from Thanksgiving of '81 until this Court date on [S-35] January 7th, '82. So it was on January 7th, '82, that he was actually . . . the order was rescinded.

Q So was the Defendant supposed to be continuing with counseling and treatment sessions after he was released from the Training School?

A Yes. Because he was not. . . Okay. There were six special conditions to be imposed on . . . a the time a formal release from the Center. That would have been on January 7th. He agreed to a six point program or a contract that if he kept those six areas which were to keep the family curfew, stay employed, stay out of trouble, that kind of thing, normal kind of expectations. And he signed that contract on January 7th. But one of the specific ones in there was for counseling to continue. From the time he got out in November until then, he was not receiving specific counseling. He was seeing his Juvenile Probation Officer, but he was not into the counseling cause he had not agreed to that contract till January 7th. On that day he signed a contract and agreed to keep all these parts of his program.

Q And I understand one of the signatories to that contract would have been Mrs. LaFage, the Defendant's mother?

A Yes sir, it was.

Q So then she would have been completely aware of all the conditions?

A Yes sir, she was.

[S-36] Q And would have agreed to them?

A Yes sir, she did.

Q So then that would have been the end of the Defendant's commitment to juvenile institutions and treatment centers, is that correct?

A Yes sir, it would have been.

Q And the next dealings that the State had with Mr. Mills were as a result of the charge of second degree murder and robbery with a deadly weapon, is that true?

A No sir. There was one other one. The day that he signed the contract was January 7th, '82. Later that day, he was charged in assault and robbery on a Ronald Miller. That case was dropped because of the subsequent murder charges that came on January the 9th, '82.

Q And you did the pre-sentence investigation on that charge?

A Yes sir, I did.

Q By order of Court?

A Yes sir.

Q And you have testified that in the course of doing your investigation you did have the opportunity to talk with the Defendant, is that true?

A Yes sir, I did.

Q Where was it that you talked to him?

A I talked with him at the Baltimore City Jail.

[S-37] Q And you understand I don't want you to say anything about the facts of the case that you investigated.

A Yes sir.

Q But when you talked to the Defendant, did he express any kind of remorse or anything like that to you about the murder, the murder and robbery with a deadly weapon?

MR. KNIGHT: Objection.

BY THE COURT: Objection sustained.

Q Don't answer the question. Did you ask the Defendant about the facts. . . Don't state the facts, but did you ask him about the facts of the case that you were doing the pre-sentence investigation on?

A Yes sir, I did.

MR. KNIGHT: Objection.

BY THE COURT: That objection is overruled.

Q And did the Defendant describe what had happened to you? Don't tell us what he said, just yes or no.

MR. KNIGHT: Objection.

BY THE COURT: He's only asking for a yes or no answer. I'll permit her to give a yes or no answer.

A Yes.

Q When you talked to the Defendant in the course of doing this pre-sentence investigation, from his answers that he gave you, did he appear to be interested in answering your questions?

[S-38] MR. KNIGHT: Objection.

BY THE COURT: Objection is overuled.

Q You may answer.

A Yes.

BY THE COURT: Again, a yes or no answer.

A Yes, he did.

Q Did he appear to be interested in anything particular when he answered your questions?

A Yes.

Q What was he interested in particular?

MR. KNIGHT: Objection.

BY THE COURT: Come up for a moment will you please, gentlemen?

(Counsel and the Defendant approached the bench and the following ensued:)

BY THE COURT: What's your proffer?

MR. NORMAN: I proffer that what I'm trying to elicit from this witness is that the only time Mr. Mills was interested in answering this lady's questions were in reciting the specific details of the previous murder, and

also in discussing the newspaper article which had appeared reciting the specific details. I'm not asking her about the specific details.

BY THE COURT: Do you wish to be heard?

MR. KNIGHT: Yes sir. First of all, I don't think that it's germane at this point; that there's been no foundation [S-39] for the questions that he's going to ask her; no showing how long she had known him. I just don't think it's relevant at this point. I think the Jury has already made a determination as to the other facts. And I don't think this is of probative in regard to what we're doing here. I just don't think it has any weight on it, her impression as to what he had. . . I think what speaks will be the facts themselves.

BY THE COURT: All right. I will overrule the Defense objection and let her answer that question in a very, very narrowly . . . narrow scope which you've proffered, within that narrow scope. Otherwise, I'll sustain and strike it.

MR. NORMAN: Yes, Your Honor.

(Counsel and the Defendant return to the trial tables and the following ensued:)

Q Miss Grove, the question that I asked you was. When you were interviewing Mr. Mills in conducting this pre-sentence investigation, you've already said he appeared to be interested in talking to you about certain things?

A Yes sir.

Q What in particular was he interested in talking to you about?

A While he had pled guilty to the charge of murder, he was interested very much in establishing. . .

Q Well just stop right there.

A Okay.

[S-40] Q This has to be a very general. . .

A Yeah.

Q . . . very specific answer because of the Court's ruling. You and I discussed this yesterday, did we not? We discussed. . .

A I'm sorry. Are you Mr. Norman?

Q Yes. By telephone.

A Okay. Right.

Q We talked yesterday by telephone. And my understanding from you was . . . just so that we don't get an objectionable answer . . . was that Mr. Mills was interested in discussing the facts of the previous case. . .

MR. KNIGHT: Objection, Your Honor. The. . .

BY THE COURT: Objection sustained.

MR. NORMAN: I'll withdraw that line of questioning, Your Honor.

BY THE COURT: Very well.

Q Miss Grove, moving on, did you interview the Defendant's mother, Mrs. LaFage?

A Yes sir, I did.

Q And when you interviewed her, did you discuss with her the Defendant?

A Yes sir.

Q Did you write down the substance of what she had to say of your pre-sentence investigation which you prepared, at least some of it?

[S-41] A Yes.

Q Would you then please refer to the pre-sentence investigation which you prepared so that you can answer my questions? The interview was conducted at the home of Mr. and Mrs. LaFage, is that correct?

A Yes sir, it was.

Q Did Mrs. LaFage express any kind of concern or fear to you?

A Yes sir, she did.

Q What about?

MR. KNIGHT: Objection.

MR. NORMAN: May we approach, Your Honor?

BY THE COURT: Yes. And I'm flying blind. I don't have a copy of the report from which you're eliciting this testimony.

(Counsel and the Defendant approached the bench and the following ensued:)

BY THE COURT: Do you have an extra copy?

MR. NORMAN: No, Your Honor, I don't, but you can have . . . you're welcome to that.

BY THE COURT: Where are you. . .

MR. NORMAN: On the last page, right here. I'm not interested in her recommendation. I'm just simply interested in the substance of the discussion she had with Mrs. LaFage. And the reason I feel I have to do this now is because the [S-42] State gets no rebuttal. In other words, if I ask Mrs. LaFage if she said these things, and she says no. . .

BY THE COURT: No, you have no right to rebut.

MR. NORMAN: . . . I'm stuck.

BY THE COURT: Do you want to be heard on that, Mr. Knight? Understanding his problem with the. . .

MR. KNIGHT: What is the. . . I don't know . . . couldn't see what the quote was.

BY THE COURT: I'm not sure what the proffer. . . Make a proffer so Mr. Knight will understand exactly what we're doing.

MR. NORMAN: The proffer, Your Honor, is that this witness will testify that the Defendant's mother told her that from a very early age she had a lot of difficulty controlling the Defendant; that she was afraid of him; that she hesitated and in fact did not try to control him for fear of having herself attacked or her house broken up, what have you; and that also she was specifically afraid . . . and this is written in the report . . . that if he was ever released again that he would commit the same act, i.e. murder, again.

MR. KNIGHT: I don't see where it's in the report, Your Honor.

MR. NORMAN: Right here.

MR. KNIGHT: Okay. As long as he limits the questions to the recommendation in that paragraph, I don't think we have [S-43] any problem with that, Your Honor.

BY THE COURT: Okay. I'll permit it.

MR. KNIGHT: I just didn't know where he was going.

MR. NORMAN: Thank you, Your Honor.

(Counsel and the Defendant returned to the trial tables and the following ensued:)

Q Miss Grove, I asked you. . . You indicated to me that Mrs. LaFage expressed some concern to you?

A Yes sir.

Q And some fears. And I then ask you what those were about? Would you now tell the Jury please what those were about, confining them please to the remarks that are in your pre-sentence investigation?

A Okay. She expressed the fear that Mr. Mills would commit a murder if given the opportunity again.

Q She also expressed certain desires, did she not, concerning the placement of her son?

A Yes.

Q And those were also set forth in your pre-sentence investigation?

A Yes sir.

Q And what were those desires?

A She did not want him in the community, but she felt that while confined he should be treated because at the end of a long sentence, if he was released even after a long sentence, [S-44] he would do it again; it didn't matter how long he stayed inside an institution, that wouldn't change him; he needed some changes internally or he would commit another murder.

MR. NORMAN: Thank you. I have no further questions at this time.

BY THE COURT: Cross-examination.

MR. KNIGHT: Yes, Your Honor. If it may please the Court.

CROSS-EXAMINATION

BY MR. KNIGHT:

Q Mrs. Grove, how many times have you actually face-to-face talked with Ralph Mills?

A On one occasion, possibly two. I don't recall if. . . Some cases I go back and talk to the person a second time. I really can't recall if I went back a second time to see him.

Q So you talked with him one time during the time you made this PSI?

A Yes sir.

Q How many times did you talk with his mother?

A Talked with her once or twice over the phone, and for about two and a half hours at her home.

Q All right. Now you've indicated to certain records you had in your possession here today when you testified as to where he had been prior to that. This was from records kept at other institutions, was it not?

[S-45] A Yes sir.

Q Did you ever visit him in an institution?

A At the Baltimore City Jail.

Q And that's the only time you've ever visited him, is that true?

A Yes sir.

Q And the first time you saw him was in fact after the murder was committed, is that true?

A Yes sir.

Q Okay. So you know nothing of the specifics as to his treatment during the time that he was in counseling at the German Children's Home, do you?

A His mother described for me what was going on there, and the records describe for me. His mother discussed it, so I'm taking her version of what she recalled in addition to Juvenile Services.

Q So as a matter of fact, your testimony is secondhand, would that be a fair statement?

A I was not there. Yes, it's secondhand.

Q Okay. Have you ever been to the German Children's Home?

A Yes sir, I have.

Q How many times?

A Five or six perhaps.

Q Have you ever met Mr. LaPage?

[S-46] A Yes sir, I have. He was at the home during the same two and a half hour interview.

Q Okay. Now have you ever had any education or a guided tour as a State employee through a children's home and telling . . . they say and here's what we do here, or a conference or a seminar of any type that would describe how the children were treated in the German Children's Home?

A Yes sir.

Q How about the other institutions run by State agencies?

A Yes sir.

Q Okay. Now you indicate that you wrote a pre-sentence investigation at one time, did you not?

A Yes sir.

Q And that pre-sentence investigation would be dated November 24th, 1982?

A Yes sir.

Q Do you have a copy of that with you today?

A Yes sir.

Q Would you refer please to page 6, about the seventh line down, the sentence beginning, "In October 1978, Ralph's mother agreed to send him to Children's Home, Catonsville." Is that true?

A Yes sir.

Q Was there to your knowledge ever any program [S-47] recommended for Ralph that Mrs. LaFage did not agree to?

A Yes sir.

Q That she did not agree to?

A Yes sir.

Q What program was that?

A I don't have the juvenile records here. I was not told to bring the juvenile records, so I didn't. But in there it refers to various. . . Okay. There's an overlap of programs. Juvenile Services and Department of Social Services have two different sets of resources. Until November of '79, Ralph was under jurisdiction of both. Social Services would recommend one type of placement to Mrs. LaFage, and Juvenile Services would recommend a different type. At times she would express a preference for one or the other. At one point, there was agreement among Social Services and Juvenile Services about a particular placement. I can't recall if it was Hannah Moore or. . . There were several letters and so forth in there. At one point, she refused a particular home because she had heard some other things about it. That's all the notes indicate. There were. . .

Q Did she tell you those things that she had heard at any time of conversation when she had a conversation with you?

A Pardon me?

Q Did she tell you why she refused one certain home or two when she had a conversation with you in her home?

[S-48] A Some times she didn't want him there because it wasn't secure enough; that some of the placements that they wanted to send him to were not secure enough. Others were inaccessible, if he was there it would not be a place where she could go to see him or have any access. There were various reasons expressed. But to answer your question, yes, there were some that she refused those placements.

Q And that was in some cases almost a Hobson's Choice. If you understand, the lesser of two evils so to speak?

MR. NORMAN: Objection, Your Honor.

BY THE COURT: Objection is overruled.

Q Answer that if you would.

A Okay. In some cases she did have a choice, and she took one or the other choice. Sometimes she would follow the recommendation of the counselor. Sometimes she did not. At one point, there was a placement afforded, and she preferred to have him in the community. These were all, you know . . . Juvenile file has this at length, if you would want that.

Q Did she . . . Was she always interested in having him receive some kind of treatment according to the records that you reviewed?

A The records indicated that she expressed interest, but then did not follow through with keeping community appointments when so directed.

Q Would that be on many cases because Ralph in fact [S-49] wasn't there or wasn't available?

A It indicated that she told them she did not follow through because she was afraid of the repercussions. She was in fear for her own safety or her own property, because he would damage property or threaten her.

Q Now you wrote in your 19 . . . on page 6, again looking at your report . . . you indicated that in September '79 his probation officer was transferred . . .

A Uh huh.

Q . . . to another probation office. And you say in there that she indicated . . . that Mrs. LaFage was still actively seeking community placement for Ralph, who remained ungovernable when outside the home. Is that what she told you? Is that a correct statement?

A The . . .Okay. Let me . . . The notes in the Juvenile Service file indicated that. I did not talk to that probation officer. But the notes by that probation officer indicated that Mrs. LaFage had told her that she was still seeking treatment. This was at a time when he was under commitment to his mother by Juvenile Services. That was the time that he was committed for home placement.

Q All right. Now if you come on down a little further beginning with, "Upon recommendation of staff personnel, Ralph was released on 9/19/1980." Is that true?

A Yes. Again that's not a termination of the commitment. [S-50] He was released on after care. That was just a . . .

Q I understand.

A Okay.

Q And then it says that there was a recession order, to which you alluded earlier. I believe you said by Master Golden about the 19th of January of 1981.

A Recision. Yes. Uh huh.

Q That was over the objection of the mother, wasn't it?

A Yes.

Q Did you talk to her about that when you went to the home?

A Yes sir, I did.

Q Did she lay any basis for her objection to . . . for his being released?

A Yes.

Q Now you also said there was an overlapping of cases. Did that actually cause some confusion and some problems of funding some of the programs in which Ralph was involved?

A Yes. It provides a technical problem. Because if he has committed so many offenses, then he's no longer considered a safe person in the foster homes and that kind of thing available to Social Services, so there's a problem with jurisdiction.

Q In fact Ralph was released several times over the objection of the mother during this entire time wasn't he? [S-51] A Yes sir. She . . . The records and she both indicate that, yes.

Q And her position almost consistently and even during your interview that was that Ralph was dangerous, is that true?

A Yes sir.

Q And did she also tell you that he needed some type of help more than what he was receiving?

A Yes sir.

Q Now you stated that when he was released in November of 1981 over a Thanksgiving that Mrs. LaFage agreed to that. However . . . Is that true?

A At that point, she said that he was doing better, and that's why they continued the release.

Q And did she tell you at that time that Ralph asked or indicated that he wanted to keep his room at the Training School for Boys when he left?

A Pardon me?

Q Did she tell you that?

A Pardon me?

Q Did she ever tell you that during a conversation that when Ralph was . . . the order was of recession . . . or when he was sent home over Thanksgiving, did she ever tell you that he wanted to go back? And they changed a rule as you indicate . . . testified to earlier about December and scheduled a follow-up for Court review in January, January the 7th the next year, is [S-52] that true?

A I don't recall her saying that. And in his file was a three page letter, handwritten by him, to his counselor begging to be out by January 15th, '82 because he had a job offer, and he promised all kinds of better behavior and so forth. He specifically wrote a letter asking for that particular release.

Q Okay. In November of 1981, again when he was released, when you alluded to a six special conditions . . .

A Yes.

Q . . . which was to be imposed on him, that was over the objections of the mother, was it not?

A No sir.

Q Would you refer to your page 6 again in your notes? About the eleventh line from the bottom, in November 1981. I will read, "In November 1981, Ralph was recommended for community release from the Maryland Training School for Boys over family objections and six special conditions were added." Now that's the six conditions you cited, is it not?

A Yes sir.

Q And that indicates there that she objected to release at that time as a result of your PSI, is that true?

A At the time of his being left out for Thanksgiving leave, she objected. He adjusted well over Thanksgiving and Christmas. And at that point, she favorably signed a contract [S-53] on January 7th, '82.

Q Did there ever come a time when the Department of Social Services or the Department of Juvenile Services would take him before Master Golden in order to find placement for Ralph?

A Yes.

Q When was that?

A Just a minute.

Q Well you've answered that there was. Do you know the upshot of that or the result of that particular order?

A Okay. The problem becomes all the dates in here, and . . . He was committed to Maryland Training School for Boys was the bottom line, because he was refused because of the safety factor at several other places, and Juvenile Services had no choice but to put him at Maryland Training School for Boys. And the Judge ordered that he not be released until the Judge could review the case specifically.

Q Was it ever reviewed?

A I'm sorry. 3/31/81. That occurred. Not to be released until Court approves after care plan. That was signed by Judge Silver on 4/27/81. He was released on December 2nd, '81, to after care by Judge Silver with the six special conditions to be imposed with the Judge requiring a review on January 7th, '82, to sign those conditions. That was the point at which . . . this was after the Thanksgiving leave, and he was [S-54] supposed to come back on December 2nd. And the mother agreed that he had done better. And so on December 2nd the Judge

allowed his after care to continue to January 7th, at which time the six conditions were signed.

Q Would it be a fair statement to say that just about every time Ralph was out he committed some new offense?

A Yes sir.

Q Would it be a fair statement to say that Mrs. LaFage's position was consistently that he was not governable outside the home?

A Yes sir, except that during the period from November 2nd . . . I mean Thanksgiving whenever that occurred that year, up until January 7th there were no offenses. That was the longest period in the community without.

Q Under whose supervision was he at that time?

A He was in home placement under after care direction by Juvenile Services Administration.

Q Do you know specifically whether he had any therapy from a certified psychologist or psychiatrist from the time he was thirteen years old until January of 1981?

A The ones I have listed are James Smith, June of '80, he's a psychiatrist; Dr. Famiotta (phonetically), I don't know whether that was a Ph.D. or a psychiatrist; Dr. Vargus, M.D., psychiatrist; William E. O'Donnell, Ph.D., psychologist; Sigmund Mann, Ph.D., psychologist. Those are the only ones I [S-55] have listed here. There were others. And he was evaluated at my recommendation for this pre-sentence by . . .

Q What specifically did each of those people you have listed do with Ralph? Did they treat him, or just interview him, or do you know?

A At the Training School . . . Wait a minute. Okay. Sigmund Mann worked with him at the Training School. I don't have that man's notes. I don't know exactly what happened. Psychiatrists at the Training School, James Smith, also oversaw his care.

Q Did you ever talk to any of those people whom you listed about Ralph Mills?

A No sir. I reviewed the notes.

MR. KNIGHT: One moment, Your Honor.

(Pause)

MR. KNIGHT: That terminates our examination, Your Honor.

MR. NORMAN: Just a few more questions, Your Honor.

REDIRECT EXAMINATION

BY MR. NORMAN:

Q Mrs. Grove, you indicated to Mr. Knight that you interviewed the Defendant on one or perhaps a couple of occasions, is that correct?

A Yes.

Q Is that the usual procedure that the Division of [S-56] Parole and Probation follows when conducting a pre-sentence investigation?

A Yes sir.

Q In other words, there's nothing out of the ordinary about that?

A No sir.

Q And the evidence which you have given to the Court in response to my questions and Mr. Knight's has been derived from the official records and your own interviews, is that correct?

A Yes sir.

Q Finally, if you would, I would ask you to turn to page 6 of your pre-sentence investigation and complete the sentence which you read for Mr. Knight which begins in October 1978?

A "In October 1978, Ralph's mother agreed to having him sent to the German Children's Home in Catonsville. But after nine months there, during which he was found to be constantly stealing, drinking and using drugs, he was expelled."

MR. NORMAN: No further questions.

RECROSS-EXAMINATION

BY MR. KNIGHT:

Q You did say that in your testimony earlier did you not?

A I wasn't as specific about his charges.

[S-57] MR. KNIGHT: Okay. Thank you very much.

BY THE COURT: You may step down. Please do not discuss your testimony with any of the other prospective witnesses. You may be subject to recall.

MR. NORMAN: Your Honor, that concludes the testimony the State proposes to offer at the sentencing phase.

BY THE COUPT: All right. Lets take a short recess ladies and gentlemen. Again, please do not yet discuss the case with each other, and do not permit anyone to discuss the case with you.

(Recess taken from 10:55 A.M. to 11:05 A.M.)

MR. KNIGHT: Call Mrs. LaFage please, Your Honor.

JANICE LAFAGE

a witness produced on behalf of the Defendant, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KNIGHT:

BY THE CLERK: State your name and residence to the Court please.

A My name is Janice LaFage from Baltimore, Maryland.

Q Mrs. LaFage, are you the mother of Ralph William Mills?

A Yes, I am.

Q Okay. How many children do you have?

A Four children.

[S-58] Q What are their ages?

A Twenty-four. Twenty-two. Twenty. And eleven years old.

Q Okay. And I note that you don't have Mills as a last name. Are you divorced?

A Yes, I am.

Q And how old was Ralph when you were divorced?

A When I was actually divorced, it was in 1971.

Q Okay. And he was born in the 5th of May, 1964. So that would have made him six or seven years old?

A No. When I met Ralph's natural father now, Ralph was that age.

Q When you met Ralph's . . .

A I was actually divorced from his real father was that year.

Q All right. You got a divorce from Ralph's father?

A Yes.

Q And then you married Mr. LaFage, who is Ralph's stepfather?

A Yes, in 1972.

Q Okay. Now I want to go back kind of chronologically and ask you some questions concerning Ralph. And I would appreciate if you would answer them the best you can. How far did Ralph go in school, do you know?

A The sixth grade.

[S-59] Q Okay. And at some point in his life he began to have trouble with the authorities, is that true?

A Yes, it's true.

Q When did he first begin having trouble with juvenile agency or any other agency involving his conduct and school patterns and the like?

A Do you mean in school or in criminal?

Q In school, did he have problems in school at what age?

A He had problems in school starting at a young age, but not severe problems at a young age.

Q Okay. When did you first come in contact with Juvenile Services or any other agency regarding Ralph and his behavior?

A Ralph was approximately eleven, twelve years old.

Q Okay. What was the nature of those problems?

A He was just . . . He was having problems in school, and the school had advised me I'd have to seek some kind of . . . I had to do something with Ralph. They didn't give me any choice but to do something. And I contacted Caroline Street Mental Hygiene, which I was told I would be on a waiting list. They didn't tell me how long the wait would be. They just said it would be a waiting list.

Q That was a result of what type of conduct or what type of offense?

[S-60] A What caused me to contact them, is. . .

Q Yes.

A Just school behaving, behavior. . . Just little things that I noticed with Ralph.

Q Okay. And what happened at the Hygiene. . .

A They put me on the waiting list.

Q What happened next?

A Six months went by, a couple months, it was close to six months as I remember. And I kept calling them and asking them when . . . when was my appointment. They said there was a long waiting list. And every day I was going down school for Ralph, because they was calling me to come to school.

Q Because of his conduct?

A Because of his conduct.

Q Go ahead.

A And one particular day, I can't remember the dates, it's too many days to remember, but this one particular day I remember when they called me the principal was just hysterical. He told me to get down to the school. I went down there. . . Shall I tell exactly how it happened?

Q Go ahead.

A I went down to the school. He had told me that either I had to do something with Ralph, he couldn't

come back to the school, because the security guard at the school was . . . he had just pushed him completely over the edge, and he was chasing [S-61] around the school when I got to the school, he was chasing him around the school, was going to run him over with his car.

Q Who was chasing whom, Mrs. . . .

A. The security guard was chasing Ralph. For what reason I don't know. He had just did something then that. . .

Q How old was Ralph at that time?

A He was about twelve years old.

Q Okay. As far. . . What happened to Ralph next?

A I called to the Mental Hygiene Clinic hysterical, and I told them they had to get me some kind of appointment, I couldn't take any more, they had to please get me some kind of appointment, it was emergency. I took Ralph down there, and Susan Reckendahl (phonetically), she was the therapist, she. . . The whole family had to be seen at first. When we was talked to. . . Shall I go on?

Q Yes. Please.

A Couple months went by with therapy. She would talk to Ralph by hisself, then talk to me by myself, then I would have to tell on a daily basis what he had done. The problems were still continuing at school and on the outside. So she decided he needed psychiatric help. So. . .

Q Did he receive psychiatric help?

A He received psychiatric help from a Dr. Bargess.

Q How many times?

A He was seen by her I would say no more than five [S-62] times.

Q How old was he at the time she saw him and over what period of time?

A Just a couple months, because he was ready to be. . . Well that's the end of the story. But just a couple months.

Q What was the end result of her seeing Ralph?

A Well first what she. . . The first diagnose that she had was MBD.

Q What's MBD?

A Minimal brain damage. And they give me a booklet to read for me to try to follow at home, and told me to go by those steps. So I. . .

Q Did you do that?

A Yes, but the steps that I went by just didn't seem to work either. And I continued to tell her this.

Q What was the end result?

A Then she said that he would be seen by psychiatrist; that a psychiatrist felt that he might. . . I asked her if he was showing any signs of schizophrenia, cause there is schizophrenia in our family.

Q Go ahead.

A I was grabbing at anything I could grab, cause I didn't know what was wrong with him, why he was. . . Just anything I could grab at. She said yes. That's all she said was yes, but we can't tell now, it's too early. Then they [S-63] decided that they had. . .

Q Who is they?

A Susan Reckendahl and Dr. Bargess.

Q All right. What did they decide?

A They decided to put him on Mellaril and look for placement, because I couldn't be constantly watching him. I couldn't be with him twenty-four hours a day.

Q And this medicine. . . What type of medicine again?

A It's called Mellaril.

Q What was that for?

MR. LONG: Objection.

Q If you know. Excuse me. What were you told it was for?

MR. LONG: Objection.

BY THE COURT: Objection sustained.

Q How long was he on Mellaril?

A While he was waiting for placement, he was on Mellaril for I'd say approximately nine months, eight months, eight or nine months.

Q All right. And you indicated that during this time how often did he receive therapy from a psychologist or psychiatrist?

A While he was waiting for placement, because of the waiting for placement, they felt that just the Mellaril and seeing her not very often. . . The therapist he would see more [S-64] often than he did the psychiatrist.

Q Yes. I asked you how many times during that nine months did he see a psychiatrist or a certified psychologist?

A Couple times.

Q Okay. After the nine months was up what happened?

A We finally. . . We had to go get the funding from the Department of Social Service and had to find some place that would accept it, cause I didn't have the money to pay for. . .

Q Who is we?

A My husband and I didn't have the money to pay for private placement.

Q All right.

A So Susan Reckendahl and I found placement at German Children's Home.

Q Did you agree with putting Ralph in the German Children's Home?

A Yes, I did, because they had told me during the time that . . . when he was . . . during the waiting period that I was to keep him with me at all times. And it was. . . I have other children. And it was just to the point where I had to let him out once. . . my sight . . . he got. . . You know, he had to go out once in awhile. But they. . . I was instructed to keep Ralph with me at all times.

Q All right.

A Under close supervision until they could find [S-65] placement.

Q Did you keep him under close supervision?

A As close as I could.

Q Did you keep him in your home during that period of time?

A I kept him in my home, but he did get out. I mean he went outside.

Q I understand that.

A There was things I had to do and. . .

Q But you kept him under supervision in your home?

A Yes.

Q How did he act in the home?

A Well as long as I could constantly watch him, he was fairly well in the home. He wasn't. . . He was like other children. He was, you know. . . I mean he wasn't a perfect angel at home.

Q Did he break up things inside your home?

A We had. . . Yes, we had a couple instances where I found things that was cut up.

Q Okay. Did you indicate that to the therapists?

A Yes, I did. But Ralph would deny it. So it wasn't pursued.

Q Okay. What did you next do with Ralph?

A He was placed in the German Children's Home.

Q All right. What happened there, if you recall?

[S-66] A When he got there, the doctor there . . . I don't know his name . . . said that he completely disagreed with the psychiatrist, that he should be taken off the Mellaril. In other words, it was crazy in my words, crazy to put him on it to start with of that age; it could have affected his eyesight; it was too strong for a child that age.

Q All right. Okay. Just one moment now. You took him to German Children's Home, and they took him off the medicine?

A Completely.

Q Okay. What happened in the German Children's Home?

A The same thing that happened outside when I left him outside before I was told to keep him in.

Q Describe what happened.

A Well they had a trailer out there the first incident that men was working on. He could never. . . They involved him in it. Windows was broke out of it. A lot of things happened. They never put it right on Ralph. There was animals found dead and. . .

Q Okay. Lets talk about Ralph. Now how did he do in German Children's Home?

A He didn't do well there.

Q Why?

A It wasn't supervised enough for him. It just. . . He seemed frustrated more.

Q Did you indicate that to anyone at the German [S-67] Children's Home?

A Yes, I did.

Q How often?

A Just about as often as I could get in contact with anyone.

Q How many times did you visit him there?

A It wasn't very often, because I couldn't . . . I didn't drive then. When I did visit, I caught the bus.

Q Did he come home at any time while he was in German Children's Home? Did he come home on visits?

A Truthfully I can't remember. It's been just too much for me to remember.

Q Did he ever run away from school to your knowledge?

A Excuse me. Can I answer that last one? I remember Christmas, yes, he did come home.

Q Okay. Do you know whether or not he ever ran away from the German Children's Home?

A No, and it was not confined.

Q Okay. How long was he in the German Children's Home?

A I'm giving approximate dates, cause it's too many dates for me to remember. About nine months.

Q From when to when, Mrs. LaFage?

A From around '78 or '79.

Q Okay. What happened when he got out. . . Did there come a time when he no longer went to the German Children's [S-68] Home?

A Yes.

Q What happened next to Ralph, Mrs. LaFage?

A I was given a week notice and told that they could not. . . They didn't have the structure there, didn't have the staff there to handle Ralph. I was told to take him home, and I refused to. And that. . .

Q Why did you refuse to take him home?

A Cause I knew that at this point. . . I was scared what was going to happen when I brought him home.

Q What did you think was going to happen?

A I didn't know. That's just. . . I didn't know what was going to happen. I just knew that Ralph did not belong in our neighborhood in the environment with the drugs. I knew he did not belong at home. I couldn't do anything else for him at home.

Q All right. Then when you refused to take Ralph home, what happened next?

A Social worker . . . I remember her name clearly. Some people I do remember clearly. There's been so many people in Ralph's life. . . . she said if I refuse to take him home that that was. . . In other words, I didn't have to. And she showed me a placement that they had. It was like the old YMCA building. If anybody knows Baltimore, it was up like near. . .

Q They don't. But it was in an old building?

[S-69] A . . . the downtown. . . Yes, it was up on the . . . I can't remember what floor, but it was horrible. But at that placement he would be allowed out from a certain time in the morning to a certain time in the evening. So that was useless too, cause he would be allowed out, and he would get involved in the same things.

Q What was the things he was getting involved in, Mrs. LaFage?

A Drugs. Drugs.

Q What else?

A Stealing, robbing anybody he would come in contact with.

Q Was that a pretty well pattern of conduct for Ralph?

A Yes.

Q Did his . . . the people who were supervising him know that?

A Yes.

Q Did you tell them?

A Over and over, yes.

Q Okay. Now there came a time when he went to the Maryland Boys Home, is that true, the Maryland Training School for Boys?

A Which time?

Q In May of 1980?

A Yes.

[S-70] Q How long was he in there if you remember?

A He was in there approximately six months.

Q What treatment was he getting, if any, if you recall?

A None.

Q Do you know whether or not he had any type of group counseling during that period of time?

A The way I understand they operate at there, if you ask for. . .

MR. LONG: Objection.

BY THE COURT: Objection sustained.

MR. KNIGHT: Thank you, Your Honor.

Q All right. Did there come a time. . . Did you ever talk to the persons supervising him when he was in the Maryland Training School for Boys?

A Yes, I did.

Q Did you make any recommendations to them as to Ralph's treatment?

A Yes.

Q What were those recommendations?

A I needed help for Ralph. That's all I could tell them. I needed help for him.

Q Why did he need help, Mrs. LaFage?
A Why did he need help?
Q Yes.
A Okay. He needed help because I went to Court every [S-71] year since I can remember Ralph being twelve, thirteen years old, every single year, sometimes two, three times a year, sometimes two or three times a month. That's why I have a hard time remembering people's names and dates. I've been in the Courtroom every year for Ralph since he's been I'd say twelve, thirteen years old. Every year saying the same thing. Help my son.
Q What happened as a result of you going to Court with Ralph?
A Nothing happened. I never went in the Courtroom and said let my son go. In fact I went against the Masters a lot of times. When they would ask for him to be released, I would refuse to take him home.
Q Why?
A Because I didn't want him out on the streets where he could get into more drugs and rob more people?
Q Did he ever run away from the Maryland School for Boys?
A Yes.
Q Do you remember when that was?
A No, I don't.
Q How did he get along with his real father before you and he were divorced?
A He was too young to. . . Before we were divorced . . . well after we separated, he had contact with him, but he would [S-72] promise Ralph things and not live up to them and disappoint him, so I stopped the contacts with him. I never told him one way or another as far as his father, because I figured it was for him to decide the type of father he had.
Q Does he visit with him?
A He can't visit with him.

Q I mean before he was incarcerated, did he ever visit with his father?
A No, because before Ralph was incarcerated?
Q Yes, ma'am.
A This last time?
Q Any time. Did Ralph visit with his. . .
A Most of the time he couldn't, because most of the time up until his younger years when I stopped the visits his father was either incarcerated or running as a fugitive from the law.
Q Okay. Now how does he get along with his stepfather?
A They get along. He's never accepted him as a . . . as far as accepting him as a father.
Q How do you and he get along, you and Ralph that is?
A How do me and Ralph get along? Ralph and I are close because I'm the only one I think that understands him. I would have years ago given up on Ralph if I didn't believe in Ralph. Whether he's my son or not, I would not. . . If I could put it this way, I would not embarrass myself as far as being seen in [S-73] places like this and being harassed at other times, I would have completely washed my hands of the child, I'll put it that way.
Q What's Ralph's intellectual level? Is he. . . What do you consider him intellectually as compared to other people?
A Ralph believes he's. . . He believes he's very smart, but as far as . . . it's slow.
Q From the time Ralph was thirteen until January of 1982 about, how many times had you asked the agencies to help Ralph?
A If I have to give the exact number, I couldn't tell you. I couldn't honestly answer that.
Q Was it often?
A The agencies or the courts?

Q Both.

A I couldn't answer that exactly. Just like I say, every time Ralph went to court.

Q And every time he went you asked?

A I asked for some sort of help for him. I didn't even know what kind of help I was asking for. I just knew that I didn't want Ralph on the street where he could rob somebody else. Which it's like. . . The only way I can describe it like a line would be drawn, as he got bigger and bigger he was more dangerous. I could feel it, cause I'm his mother.

Q Did you ever tell anyone that you were afraid he [S-74] may kill someone?

A Yes, I did.

Q Was that before January of 1982?

A Yes.

Q How many times?

A I told it in the Courtroom once.

Q Did you ever tell any investigators that or his supervisors?

A I think. . . Before Ralph's. . . I don't know how to say. . . Before his last what I call. . .

Q I'm asking you about before January of 1982, you said you. . .

A Yes sir. There was a person that come around and was asking about Ralph and what I thought might happen to him. It was during the investigation that was being held. I told her the same thing I told Master Golden in the Courtroom, that I felt that if he wasn't helped that he would. . . I thought Ralph would be killed, or he would kill someone else, or he would kill someone.

Q So you said that on at least two occasions, is that correct?

A I know of two, yes. That can be verified in the Court. . .

Q Don't say anything. Just. . . You answered the question. Now he was in the Maryland Training School

for [S-75] Boys, did there come a time that they terminated him and sent him out of school?

A Yes.

Q Was that over your objection?

A Yes.

Q Did you at one time in November of 1982, do you explicitly remember him coming home for Thanksgiving?

A Yes.

Q Do you remember later signing a paper saying it would be all right for him to be home?

A Yes, I did.

Q During that period of time, did you have any conversation with the people who sent him home?

A In the court when we was supposed to sign the papers to send Ralph home, Mr. Jones. . . Can I say names?

Q Yes.

A Mr. Jones, who had been his . . . I don't know what they call it at these training schools . . . the cottage person up there, walking down the hall, he had stated to me that it's like when you finish twelve years of high school, that he had completed what the course . . . he completed what they could do in a six month program. There was nothing more they could do for him. In other words, they couldn't keep him any longer there.

Q What did you say to Mr. Jones when he told you that?

A I told him I thought that he. . . I didn't want him [S-76] out.

Q I'm sorry. I didn't hear you.

A I didn't want him. . . That I thought he wasn't ready to come out.

Q Now going to court and being involved with the law was almost a continuing thing wasn't it?

A Yes.

MR. KNIGHT: Thank you very much.

CROSS-EXAMINATION

BY MR. LONG:

Q Mrs. LaFage, that last conversation you had with Mr. Jones of the Maryland Training School, Mr. Jones had told you that your son had completed the program there?

A Yes.

Q And that he'd satisfactorily completed the program, is that correct?

A Yes.

Q And that's why they were releasing him?

A Yes.

Q He had done what he was supposed to do?

A Right.

Q And in fact from the time of his release on Thanksgiving '81 up until the time you signed the contract in January '82 things went pretty well with your son in the household didn't they?

[S-77] A Pretty well in the household, yes.

Q Now going back a little if we can, you indicated that your son began having problems in school when he was eleven or twelve years old?

A Yes.

Q And he was attending elementary school at that time?

A Yes.

Q And he would have been in the fifth or sixth grade?

A Yes.

Q And he was living with you in your household?

A Yes.

Q Along with your other children?

A Yes.

Q Ralph would have been the third child that was born to you?

A Yes.

Q Now when you would hear about these disciplinary problems he was having at school, would you talk with him?

A Yes, I would.

Q Did you discipline him at home?

A Yes. Most of the time he was kept in.

Q Kept in?

A Yes. Punished.

Q Restricted to his room, is that what you're talking about?

[S-78] A Yes.

Q Did you spank him?

A On occasions, yes.

Q And not as a regular matter of regular course?

A No.

Q Did you take away other privileges, for instance, letting him not watch television or something of that nature?

A Let me state it this way. No matter what privileges you took away, you could take away, like he'd be punished and put in his room then something else might happen and, you know, that he would have the television taken away.

Q All right. So you had indicated that you tried to get help with him at the mental hygiene. . .

A Yes, I did.

Q . . . the local mental hygiene program?

A Yes.

Q And that they had a long waiting list, and you were unable to get him in as quickly as you wanted to?

A Yes.

Q Did you try anywhere else at that time?

A No, because I didn't have the money to go private, and that's the only place you could go in Baltimore City is the Baltimore Mental Hygiene Clinic. I trusted in that was the place to go.

Q Did you go to the Health Department?

[S-79] A The Health Department . . . This was involving a mental hygiene. I wanted something that was more . . .

Q Did you go to the Baltimore City Health Department and seek help there?

A In Baltimore City this would be . . . Not the Health Department, no. I wouldn't connect that with mental hygiene.

Q And then eventually because of a more serious problem you say happened at school, you were able to get him into the treatment program at the mental hygiene program?

A Yes.

Q And that was with Susan Rosenthal, correct?

A Reckendahl.

Q Excuse me?

A Susan Reckendahl.

Q Ruckenthal.

A Reckendahl.

Q Reckendahl. Okay. And is she a psychiatrist or psychologist?

A Like a therapist.

Q Like a therapist. And she saw him for a period of a couple of months?

A Yes.

Q And worked with him during this period of time. And that was group counseling and group sessions?

A Yes. She thought she could resolve the problem [S-80] through her.

Q And you attended with her?

A Yes.

Q Did Mr. LaFage help attend too?

A We all had to go at first, and then he . . . He traveled on the road a lot, and she never asked for anyone else in the family after that.

Q Did she instruct you on how to discipline and treat Ralph at home?

A Yes.

Q Did you do those things?

A Yes, I went by the MBD paper that she give me, as close as I could.

Q And did he make progress during that period of time?

A No.

Q No progress at all? And you told her of course he was making no progress?

A I told her.

Q And she did nothing?

A She just kept giving me . . . I had faith in her. She was doing the best she could. She just said, you know, it'll just . . . In other words, as time goes on we'll see improvement; it'll take time.

Q She did refer you to Dr. Vargus?

A Dr. Vargus worked there. If a more stronger problem [S-81] came up she would have to recommend Dr. Vargus.

Q And your son would see Dr. Vargus?

A When it got really bad, he seen Dr. Vargus.

Q He saw him a number of times?

A Her.

Q Her.

A She was a woman.

Q He saw her a number of times?

A No. No.

Q You indicated did you not that she was . . . that he was seen by Dr. Vargus five times, every couple of months?

A I would say no more than five times.

Q Things continued to get worse at home?

A As far as being able to control Ralph? Yes.

Q You were unable to control him? When you would try to control him, what would he do?

A He would just . . . He didn't want to stay in, but he would stay in.

Q Well if you told him to stay in . . .

A He'd just have a temper tantrum. He wouldn't . . . He wouldn't go out, but he would just, you know, say I'm not . . . I don't want to listen, you know.

Q Would you spank him then?

A No, he would just . . . He didn't mind staying in his room. He would go up in his room. But he would bang his feet [S-82] or, you know, hit his fists on things, but he would listen.

Q Were you afraid of him at that point?

A Never. Never.

Q You've never been afraid of him?

A Never. My hand to God, I've never. Cause he never give me no reason to be. I'm not saying that because he's my son.

Q Well you indicated during the course of testimony he did sometimes cut things up at home, did he not?

A Yes, he did.

Q And that was I assume with a knife or scissors?

A Yes.

Q And that didn't scare you that he was using dangerous weapons?

A I can't say it really scared me. It scared me to the point because he had a younger brother at home.

Q Were you concerned for the other members of your family?

A No.

Q Did . . . Some of these times when you would discipline him, did he ever damage your furniture?

A Yes.

Q Did he ever threaten you with physical harm?

A No.

Q Never threatened you?

[S-83] A Never ever ever threatened me. Never. Never even attempted to put his hand up to me.

Q But you've testified that you were concerned and have told others about your fear that he would hurt someone else?

A Someone else, but I never feared for myself.

Q Did . . . Lets move ahead a little bit. When he was sent home from the Maryland Training School to live back with you, that happened on more than one occasion didn't it?

A Yes.

Q When he was released from that training school, were there certain restrictions on him?

A Yes, there was. He would have probation officers.

Q Okay. Was he required to attend any kind of counseling sessions?

A Most of the time, no. In the earlier part it was up to the probation officers to make sure that he was in the house a certain time, be checked on, which they did not do their job. They did not come the times they was supposed to come.

Q We you mean they pay surprise visits to the house?

A There were . . . On one occasion supposed to visit twice a day. And he apologized to me cause he had a heavy caseload.

Q Was Ralph home?

A I had one probation officer . . . If I could get some [S-84] records, I could look back. He was a colored man. And his exact words was, "If you don't bother me, I won't bother you."

Q Let me ask a question. You indicated he was released from the Maryland Training School, and he was supposed to . . . probation agents were to come around, correct?

A Yes, but not like they was supposed to.

Q Was your son home when they were supposed to be there?

A Yes.

Q So he was abiding by the rules?

A I don't know how to put it. He was . . . He would call them.

Q Who would? Who would call them?

A Ralph would call them. In other words, they were supposed to come twice a day, but when he would call them . . . In other words, what I'm trying to say is if they needed a backup Ralph could have backed them up by the call. He didn't come to the house.

Q He could manipulate the system is what you're telling me, is that correct?

A What I'm saying is, the probation officer . . . Ralph didn't do what he was supposed to, and the probation officer didn't do what he was supposed to, I'll put it that way.

Q And you reported this?

A Who was I going to report it to?

Q Did you report it?

[S-85] A His probation officer? To who?

Q I'm asking you the question.

A No, I didn't.

Q Did you report it to the probation officer's superiors?

A No, I didn't because I really thought he was the highest you could go, you know.

Q So during this period of time when he would be released, your testimony is that he would call in to his probation officer and say I'm home?

A He came a few times to the house at the beginning.

Q Answer my question. Would your son call in to the probation officer and tell that probation officer that he was at home?

A Yes.

Q Okay. And that's how he would manipulate the system, is that correct?

MR. KNIGHT: Objection, Your Honor.

BY THE COURT: Objection sustained.

Q Now you were going . . . You testified that every year you would go to court with your son from the time he was twelve to thirteen years old?

A As much as I can remember it was every year, yes.

Q And during those years, he was in the Children's Home, German Children's Home?

[S-86] A Yes.

Q He was in the Maryland Training School for Boys?

A Yes.

Q He was seen by psychiatrists and psychologists, correct?

A Repeat that again?

Q He was seen by psychiatrists and pyschologists?

A He was seen by one psychiatrist.

Q He was seen by therapists?

A One therapist.

Q Okay. He was placed out on probation with conditions?

A Yes.

Q All of these things happened?

A Yes.

Q And this continued to happen from the time he was twelve or thirteen until the time he was charged with the murder?

A Yes.

Q And during that period of time, when all of these . . . when these things were being done, what was Ralph doing?

A Getting into more trouble. In between the times that he was on the street you mean?

Q He was getting into more trouble. In your words, he was becoming more and more dangerous? Is that correct?

A He was stealing more and more. I thought Ralph [S-87] would be killed breaking into someone's home.

Q But you did tell Mrs. Grove that you were concerned that he might kill someone . . .

A Yes.

Q . . . else too? That was also a possibility?

A Yes, I did say that.

Q You indicated earlier in your testimony that there was some history of schizophrenia in your family?

A Yes.

Q Was . . . Do you have any records that show that your son was ever diagnosed as being schizophrenic?

A No, because when I called for the records, they only keep the records for so long a time, what reason I don't know, at the Caroline Street Mental Hygiene was closed up and that all the records was burnt. Anyone that had went there . . . All the records I have is . . . I have two briefcases full of any records that anyone would like to look at. They will be allowed.

Q Do you have any records to show that he was ever diagnosed as a schizophrenic?

A No, I don't.

Q Do you have any records to show that he was ever diagnosed as having some sort of mental disorder?

A MBD.

Q Minimal brain damage, that's it?

[S-88] A Yes.

Q From when . . . the time he was eleven or twelve years old?

A Yes.

MR. LONG: No further questions.

MR. KNIGHT: Just one question please.

REDIRECT EXAMINATION

BY MR. KNIGHT:

Q You stated he did well inside the household in answer to Mr. Long's question. How about outside the household?

A I'm sorry. I couldn't hear you, Mr. Knight.

Q All right. During this entire time, his conduct got progressively worse, is that true?

A Yes.

Q Now you're saying you go to court every year with Ralph. It would be a much fairer statement that it was more often than that, isn't that true?

A Like I said, it got so bad because I would say to Miss Reckendahl I can't remember . . . I had so many papers come . . . They would throw them in the door, you know, the Sheriff would bring them . . . that I had to mark them on the calendar. Sometimes it would be a couple times a month. I had to make sure I could remember those dates to go to be in court with him.

Q The same problems at school?

A Yes.

[S-89] Q How often would you go to school?

A Towards . . . Before I called . . . got some kind of help for him, I was going just about every day, that the elevator man . . . if I could add this . . . asked me if I worked there.

Q And that's how often you been to school?

A Yes.

Q And all because of Ralph's conduct?

A Yes sir.

MR. KNIGHT: Thank you.

RECROSS-EXAMINATION

BY MR. LONG:

Q Your testimony has been that the agencies and people have, in spite of your requests, not helped your son, correct?

A Yes sir.

Q What has your son done to help himself?

A I think that's . . . shows for itself in the things that he's done. He's cried out for help is what he's done.

MR. LONG: No further questions.

MR. KNIGHT: No questions.

BY THE COURT: You may step down.

(Pause)

MR. KNIGHT: Your Honor, at this point the Defendant has elected not to testify; we would rest.

BY THE COURT: All right, sir.

COURT'S INSTRUCTIONS

[S-90] BY THE COURT: Ladies and gentlemen, it is now appropriate for me to give you certain instructions. And I want to say to you at the outset that the instructions that I am about to give you are binding upon you, and you must absolutely follow them in making your findings and determinations as to the sentence in this case. You must consider all of the evidence presented in this sentencing aspect of the case, including the testimony of the witnesses and the exhibits. Evidence of the previous criminal conviction of the Defendant have been entered into this case by way of certain of the State's exhibits and testimony. Now these convictions are not merely to be considered by you in assessing credibility, but they are vidence which you may now consider in determining what is the appropriate sentence in this case.

I am going to ask Mr. Walker to distribute to each of you a copy of a form. And when you receive it, I'll continue with my instructions.

(Pause)

What I have just had the Clerk give to you is a form which is prescribed by law, both by the . . . by statute, the statute adopted by the Legislature, and by the Rules of Court. You must use this form in arriving at your decision in this case. Your decision must be rendered in all aspects in writing.

At the . . . When you begin your deliberations, I will [S-91] give to your Foreman an original of that form, which should be filled out by him, based upon the decisions which you collectively reach.

Please now look at Section 1 of the form, which reads,

"Based upon the evidence, we unanimously find that each of the following aggravating circumstances which is marked yes has been proven beyond a reasonable doubt, and each of the aggravating circumstances which is marked no has not been proven beyond a reasonable doubt."

Let me remind you that in reaching your determination as to any of the issues raised by the case and presented to you on this sentencing form your verdict must be unanimous; that is, all twelve of you must agree.

Let me, before we begin the enumeration of the items of aggravating circumstances, remind you that in order to answer any of those questions yes you must be unanimously satisfied beyond a reasonable doubt of the existence of one of those aggravating circumstances.

Now I have previously defined reasonable doubt for you yesterday in the first phase of this case. The State's burden is to prove the aggravating circumstances beyond a reasonable doubt. Now this does not mean that the State is required to offer proof beyond all possible doubt or to an [S-92] absolute or mathematical certainty. As I told you yesterday, reasonable doubt is a doubt founded upon reason. It means that the State must produce such evidence as you would act upon in a matter involving important affairs in your own lives or with regard to your own property. If the evidence is sufficient that you would act upon it in a very important matter in your own lives, then it is sufficient for you to answer yes with regard to the aggravating circumstances. If, after consideration and comparison of the evidence you have heard this morning, you cannot find an abiding conviction to a moral certainty of the existence of an aggravating circumstance then reasonable doubt does exist and you must answer no.

Now you will see from the form that there are set forth ten separate and distinct aggravating circumstances. Let me first explain to you that Maryland law requires that when the State gives notice of its intention

to seek the death penalty it is required to set forth the aggravating circumstance upon which it intends to rely at this stage of the proceedings. In this case, the State has given notice that it intended to rely on aggravating circumstance number two, which is,

> "The Defendant committed the murder at a time when he was confined in a correctional institution."

Accordingly, I instruct you that as to the other nine possible aggravating circumstances, that is, number one, and numbers three, four, five, six, seven, eight, nine and ten, that you [S-93] mark those no. The State has intended only to rely on aggravating circumstance number two, and that is the only one that you may consider. And that is, as I have said, that the Defendant committed the murder at a time when he was confined in a correctional institution. I previously defined murder for you, and that definition is as applicable in this phase of the proceedings.

Now in considering these matters, you must consider whether the aggravating circumstance number two has been proven beyond a reasonable doubt. If you unanimously conclude that it has been so proven, you should answer that question yes. If you are not so satisfied, then of course you must answer no.

Please now refer to the instruction at the bottom of page three. That instruction provides that if one or more of the above are marked yes complete section two. That means go forward to the next section. If all of the above are marked no, you do not complete sections two or three. Now should you find the existence unanimously and beyond a reasonable doubt of aggravating circumstance number two and mark that yes, then you should proceed to section two, which begins at the top of page two. That provides that based upon the evidence we unanimously find that each of the following mitigating circumstances which is marked yes has been proven to exist by a preponderance of the evidence, and each [S-94]

mitigating circumstance marked no has not been proven by a preponderance of the evidence. Again I stress that your finding as to mitigating circumstances must be unanimous, that is you must all agree.

Now mitigating circumstances may be defined as those which do not justify or excuse the offense but which may be considered as extenuating or reducing the degree of culpability. Now the burden of proving mitigating circumstances, as you have been told, rests with the Defendant. His burden, however, is to prove only by a preponderance of the evidence and not beyond reasonable doubt.

To prove something by a preponderance of the evidence means to prove that it is more likely so than not so. A preponderance of the evidence means such evidence as when considered and compared with the evidence opposed to it has more convincing force and produces in your minds a belief that it is more likely true than not true. In determining whether or not a matter has been proved by a preponderance of the evidence, you should consider the quality of all of the evidence regardless of who introduced it, and regardless of the number of witnesses which one side or the other may have produced. If you believe that the evidence is evenly balanced on the issue, that is if the scale has not been tipped, then the matter in question has not been proved by a preponderance of the evidence.

[S-95] Now lets look specifically at each of the enumerated mitigating circumstances.

Number one, The Defendant previously has not been found guilty of a crime of violence, has not entered a plea of guilty or nolo contendere to a charge of a crime of violence, and has not been granted probation on stay or entry of judgment pursuant to a charge of a crime of violence. As used in this paragraph, crime of violence means any one of the following offenses under Maryland law: abduction; arson; escape; kidnapping; manslaughter, except involuntary manslaughter; mayhem; murder;

or rape or sexual offenses in the first or second degree, or an attempt to commit any of those offenses; or the use of a handgun in the commission of a felony or crime of violence. Now if you are satisfied by a preponderance of the evidence as to that the Defendant has not been found guilty, then you mark no. If you are not satisfied by a preponderance of the evidence that he has not previously been found guilty then you answer that yes.

Second, the victim was a participant in the Defendant's conduct or consented to the act which caused his death.

Let me back up for just a moment. With regard to number one and the definition of crime of violence, I will advise you that the offenses to which the Defendant pleaded guilty in 1982 are crimes of violence as that definition is set forth in the law and in what I just read to you.

[S-96] The second potential mitigating circumstance as I have just read to you is that the victim was a participant in Defendant's conduct or consented to the act which caused his death.

Number three, the Defendant acted under substantial duress, domination or provocation of another person but not so substantial as to constitute a complete defense to the prosecution.

Number four, the murder was committed while the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder or emotional disturbance.

Number five, the fifth mitigating circumstance you may consider, the youthful age of the Defendant at the time of the crime.

The sixth mitigating circumstance that you may consider, the act of the Defendant was not the sole, proximate cause of the victim's death.

The seventh that you may consider, it is unlikely that the Defendant will engage in further criminal activity that would constitute a continuing threat to society.

Now number eight indicates, other mitigating circumstances exist as set forth below. Should you find any other mitigating circumstances not specifically enumerated in [S-97] the first seven that we have just reviewed which have been raised by the evidence and proved to you by a preponderance of that evidence you may so indicate.

In addition to considering the enumerated mitigating circumstances, you must consider as a mitigating factor any aspect of the Defendant's character or record and any of the circumstances of the offense that the Defendant proffers as a basis for a sentence less than death, and you must determine whether any such additional mitigating circumstance or circumstances have been proven to exist by a preponderance of the evidence. If you do, you must write them in the space provided and number them so that they may be distinguished one from the other. If you find no other mitigating circumstance then you make no entry upon those lines under number eight.

Now the instruction at the middle of page six tells you that if one or more of the above in section two have been marked yes, then you go on to section three. If all of the above in section two are marked no, then you do not complete section three.

Section three at the bottom of page six provides that based upon the evidence we unanimously find that it has been proven by a preponderance of the evidence that the mitigating circumstances marked yes in section two outweigh the aggravating circumstances marked yes in section one, and you answer that accordingly.

[S-98] Again let me stress the requirement of unanimity, that is your finding under section two and your findings under section three must be one in which all twelve of you agree. With regard to section three, in balancing

the various factors you are not involved in a mere counting process or numerical exercise. Rather you must apply your reasoned judgment as to whether this situation calls for life imprisonment, or whether it requires the imposition of the death penalty in light of the balancing of the aggravating and mitigating circumstances which you find to have been proved. Let me further say that in reaching your decision on the question of punishment I caution you that you are not to be influenced by passion, prejudice or any other arbitrary factor. Your decision must be based solely upon the consideration of each of the aggravating circumstances permitted, all of the potential mitigating circumstances, and a very careful balancing in accordance with the instructions that I have given you. If you then have completed section three, you must then, based upon the careful instructions set forth on page seven, determine the sentence.

When you make a determination of sentence, it must be entered on the line which follows paragraph number four, following which, each of you, beginning with your foreman, and following thereafter through juror number twelve, just place your name on the last page on the line below which your position in the jury box is indicated.

[S-99] Again let me remind you of the burdens of proof as I have defined them for you and the requirement that your verdict or your decision with regard to any of these items must be unanimous.

Gentlemen, are there any exceptions to the instructions at this phase?

MR. KNIGHT: The Defense has no objection to the instructions given the Jury, Your Honor.

BY THE COURT: Any from the State, Mr. Long?

MR. LONG: May we approach, Your Honor, briefly?

BY THE COURT: Yes.

(Counsel and the Defendant approached the bench and the following ensued:)

MR. LONG: I think it's . . . We don't have any (unclear) additions or corrections. I think it's appropriate that the Defendant be advised at this time or at some appropriate time that he has the opportunity to make an (unclear) to the Jury himself.

BY THE COURT: All right.

All right. Mr. Mills, as you were advised earlier today, you have the right to testify or not to testify. You have chosen, according to what your counsel has told me, not to testify, is that correct?

MR. MILLS: Yes sir.

BY THE COURT: You also have the right at this time [S-100] if you wish to speak to the Jury. Now that is not considered testimony. That is, you will not be necessarily sworn, take the witness stand, but you may stand and address the Jury in any way that you want to, tell them anything that you believe to be relevant to the deliberations which they are about to begin. Do you wish to do so?

MR. MILLS: No.

BY THE COURT: Do you want to confer with counsel before you make that decision?

(Pause)

MR. MILLS: I ain't going to do it.

BY THE COURT: Let the record reflect that the Defendant has conferred with counsel, with Mr. Knight, and he advises me on the record that he does not wish to address the Jury. Is that correct, Mr. Knight?

MR. KNIGHT: That's correct, Your Honor.

BY THE COURT: Is that correct, Mr. Mills?

MR. MILLS: That's correct.

BY THE COURT: Very well.

(Counsel and the Defendant return to the trial tables and the following ensued:)

BY THE COURT: Does the State have closing argument, gentlemen?

MR. NORMAN: Yes, Your Honor.

Mr. Foreman, members of the Jury, this is going to [S-101] be the last time that the State of Maryland is going to get a chance to talk to you in this case. I have no chance to come back after speaking to you now. Mr. Knight or Mr. Stillrich will get up in a few moments and will also talk to you about the same matter that I'm going to discuss with you at the moment. But I cannot come back. So to a certain extent I'm in the position of having to anticipate what Mr. Knight is going to say.

Let me say this. I stand before you representing the people of the State of Maryland, and I also represent Paul Brown, and I also represent his surviving relatives. And as I told you this is the only chance I get to do it. I'm going to begin by telling you, as I'm sure you already know, that what I'm about to ask you to do is something that Mr. Long and I did not consider lightly. The consideration to proceed in this manner was done deliberately, and a good deal of thought was put into it. I'm sure from just the way the whole trial has been handled that you're aware of that. It was not without considerable questioning, and without a lot of procedure back and forth that twelve of you and your two alternates were selected as jurors in this case. And the reason for that is because of the serious nature of this case. There is no more serious a case than the one that you have deliberated over and are about to deliberate over again.

We are asking you to take action in this case which [S-102] is the kind of action which undoubtedly should only be taken in the gravest extreme. And the State of Maryland feels that this case deserves that kind of retribution. In other words, we believe that it is proper that the ultimate penalty be imposed for what is undoubtedly the ultimate act. And again I remind you of the oath that you took when you first came here and were individually questioned; that you had no strong convictions or feelings one way or the other concerning the death penalty which would have been based on religious, moral

or philosophic grounds. And I know you took it seriously when you answered those questions. And we certainly were extremely serious when we asked them.

At this point, I'm going to go down the list of things that the Court gave you and explain to you the aggravating factors as weighed against the mitigating circumstances which the State feels applies to this case.

As the Court has instructed you, there is no aggravating factor per se which applies to this case other than number two; that being that the Defendant committed this murder at a time when he was confined in a correctional institution. And you have heard that twice now, that this was the case. That on August the 6th, 1984, Ralph William Mills was serving a jail sentence at the Maryland Correctional Institution in Washington County, Maryland. You heard that from Warden Winebrenner, and this morning from Colonel Harold Spickler. [S-103] There has been absolutely nothing introduced into evidence to come close to contradicting or arguing with that issue. I put it to you that that issue has been established beyond a reasonable doubt, and in fact beyond any doubt at all. And I don't believe that you'll hear the Defense arguing with that.

So lets now go straight on to what is listed in the instructions as being the mitigating circumstances. And I'm going to start out by telling you that frankly the State feels that none of these apply, or at least they do not apply in the way that they are written. I'll begin by addressing item number one, which essentially would be, if it were the case, which it is not, that the Defendant had never been before this convicted of a crime of violence. Listed in the crimes of violence are murder and robbery. And you have heard testified to today that the Defendant is serving a thirty year term of prison as a result of a 1982 conviction of second degree murder and robbery with a deadly weapon. Both of those are set forth in paragraph number one. There's been no argument about that. I put it to you that that has been

established as not being a mitigating circumstance because of the Defendant's previous record. So what I'm telling you is that I believe that you can easily and clearly and should mark no under that section.

Section number two. The State also believes you should mark no, because it says, "The victim was a participant in the Defendant's conduct, or consented to the act which [S-104] caused the victim's death. There has been no evidence during the entire process of this trial which shows anything at all about Paul Brown being a participant or as to having consented to any kind of act which caused his death. Again, you're free to look at all of the exhibits and the evidence, because they have been readmitted for the purpose of this sentencing procedure. And when you again review that evidence and remember that Paul Brown was stabbed forty-five times, thirty-nine times in the back, I put it to you that that beyond any doubt establishes that he was in no way a participant, and in no way consented to any act which caused his death. I therefore suggest that you mark no under the box marked section two.

Going to page five, section three, if you were to find that the Defendant acted under a substantial duress, domination or provocation of another person but not so substantial as to constitute a complete defense to the prosecution, then you could put yes in that box. Again, I put it to you that there has been absolutely no evidence at all which would even tend to show that Ralph William Mills on August the 6th, 1984, when he murdered Paul Brown in the way he did that he was acting under any kind of duress, domination or provocation of any kind, little or big. I therefore suggest that you would mark no in the box of section three.

Under section four, if you were to find that this murder was committed while the Defendant's capacity to [S-105] appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of some kind of mental

capacity, mental disorder or emotional disturbance, if you were to find that that existed, then you would mark yes in the box. I want you to key in on the adverb "substantially". I'm going to put a circle around that. It doesn't say slightly or somewhat. It says substantially. And remember the burden is on him, the Defendant, to prove that mitigating circumstance. Now the only evidence that you have heard here in this entire trial and in the sentencing procedure of anything which is remotely connected with the subject matter in that paragraph came from Mrs. LaFage, the Defendant's mother, less than an hour ago. And she testified that she had no document with her here to show that her son was suffering from for example schizophrenia. In fact the only thing that she could produce documentation on was that he was suffering from minimal brain damage. Key in on the adjective "minimal". It's a far cry from substantial. So I suggest to you that your check or "x" mark would go in the box no under section number four.

Moving on to section number five, which would be the youthful age of the Defendant at the time of the crime, the Defendant is twenty years old, so I would be hard pressed and will not attempt to deny that he is still young. However, key in on the word "youthful"; what does that mean to you? Does [S-106] it just mean youthful in age, or does it mean youthful in experience, knowledge and criminal activity? You have heard testimony which is uncontradicted, and this you can review at your own particular pace for yourself, is contained within the pre-sentence investigation going back to I believe 1978 that the Defendant has been involved in criminal activity of some kind or another. So certainly he is not youthful in terms of the criminal justice system. In fact he's committed more crimes now than most of us in a lifetime would commit. He's also committed two of the most serious crimes known to humankind already. So I put it to you that that section, the youthful age of the Defendant, was designed to encompass somebody who is not

just youthful in age but youthful in experience, youthful in knowledge, youthful in judgment, and youthful in exposure to the criminal justice system. In other words, basically a first, second, or maybe third time offender, not having been involved in anything violent or serious before. And as I've already said, he has been many times. I therefore suggest to you that you would mark no in the box under section number five.

Section number six, the act . . . If this were proved to you, that the act of Ralph William Mills was not the sole proximate cause of Paul Brown's death, then you would mark yes in that box. Again, this kind of ties in with section number two which we've already talked about. What I'm telling you is, Paul Brown didn't in any way contribute to the cause of his [S-107] death, and the Defendant is the only one who caused Paul Brown's death. There was nobody else in there stabbing Paul Brown. Nobody told Ralph Mills . . . There's been no evidence that anybody told the Defendant to stab Paul Brown or requested him to or asked him to. What I'm telling you is that the Defendant is the sole cause of Paul . . .has been the sole cause of Paul Brown's death. I suggest therefore that you would put no in that box.

Under section seven, if you were to find that it is unlikely, based on what you've heard, that is the evidence and the exhibits, if you were to find that it is unlikely that the Defendant will engage in further criminal activity that would constitute a continuing threat to society, then you would put yes in that box. Now I suggest to you that the evidence has just been absolutely overwhelming on that particular subject matter, even from the Defense. If you recall the Defendant's own mother testifying on the stand, in her words she said as he got bigger and bigger he became more dangerous. And then I'm going to read to you something which comes from a report which is in evidence which you will be entitled to read. It's on the second page of the report.

This report is a summary of an evaluation done by Sidney Wolfe, who is a psychologist at the Patuxent Institution in Jessup, Maryland. He examined the Defendant, tested him, and then came up with this evaluation. And when I tell you something at the end of what was said in [S-108] this evaluation, you'll realize that he was right on target. This is what he said, and this is from page two, second paragraph:

> "He is an exceedingly dangerous individual who harbors much hostility within the personality structure. He is homicidal, and could easily commit the crime again for which he was originally charged. There is no evidence of regret or remorse over his past criminal behavior, and in particular the act of murder."

The date of this report, January 24, 1984. Over seven months before this killing that you found yesterday the Defendant guilty for having done. So, in other words, Mr. Wolfe was right on target. It's not just the Defendant's mother who believes that he is a future danger; that he's becoming more and more dangerous; but it's also Mr. Wolfe. And also you can look at his record which is contained in the pre-sentence investigation. So I suggest to you overwhelmingly that you would mark no in the box under section seven.

Under section eight, other mitigating circumstances exist as set forth below. This is for you to decide. In other words, in addition to all the previous seven sections which I have suggested to you you should mark no in the box for, when you go back to the jury room you are free to consider any other mitigating circumstances which might exist which would justify not imposing the death penalty. Now the only [S-109] evidence that we have heard on that line . . . again I'm having to anticipate what the Defense may say on this . . . is that the State of Maryland, according to the Defense, has just not done their . . . not done their bit; they have not

supported Ralph Mills; and they have not done what is required of them to give him treatment. I put it to you that the State of Maryland can only go so far. Mrs. LaFage made a very good witness for obvious reasons. She is the Defendant's mother. She knows him better than anybody perhaps. And I certainly . . . and I'm sure you do too . . . feel extremely sorry for her. She has been portrayed and appeared to be a mother at her wit's end, and has not been able at any time to control her son. But, ladies and gentlemen, this factor cannot prevail over justice. It cannot block the path of justice. What has the Defendant done to help the Defendant? That was a question asked by the State's Attorney, Mr. Long. And that was a very crucial question. What has Ralph Mills done to help Ralph Mills? And the answer came from the witness stand, he's cried out by committing these acts. And what acts are we talking about? Murder, robbery with a deadly weapon, and again first degree . . . now, excuse me, first degree murder. The first murder being second degree. That apparently is the sum total of what Ralph William Mills has done to help himself. So essentially you are being asked to step in and give him life, because the State of Maryland has not done their part. Everyone is [S-110] responsible for their acts. And everyone must be accountable for their bad acts. Ralph William Mills has had counseling. He's had treatment. He has seen doctors, psychologists, and psychiatrists. The State of Maryland cannot be responsible for his criminal acts. Sooner or later, Ralph Mills has to be accountable. And I put it to you, that time has come now. He is accountable now. This has to stop here and now. What they are telling you, what the Defense is telling you is that they want you to give Ralph William Mills life, when he himself has taken it twice. In fact, it's basically been a crime a year since he was about thirteen. Even his mother said that, a crime a year.

He's serving a thirty year sentence now for second degree murder and robbery with a deadly weapon. Now that was imposed in November of 1982, less than three years ago. So in August of 1984, what happens? He does it again. My point is that putting Ralph Mills in jail has had no effect on him. It just hasn't stopped him. It hasn't phased him. In fact it hasn't even slowed him down, has it? And remember that category of future danger. And remember when you consider that, that there are other people besides Ralph Mills in jail. There are other people besides Ralph Mills wherever he is in jail. And I'm not just talking about other inmates. I'm talking about other guards, visitors, counselors, what have you, in the jail. And if you consider the reason and rationale behind the [S-111] aggravating circumstances, if you just look at the aggravating circumstance, number two, and consider it on its own, it may not look like much; and it may not seem to be that reasonable to you; it may not seem to be that much rationale behind it; but I'll tell you there is. In fact there's a purpose and there's a reason behind every one of the aggravating circumstances which under Maryland law authorize imposition of the death penalty. Now only one of them applies to this case. And that is that the Defendant committed the murder at a time when he was confined in a correctional institution. Now why is that reasonable? Why is there a rationale behind that? I'll tell you why. Here's a guy like Ralph Mills who's already committed one murder, and now he's done another. What effect if any is it going to have on Ralph Mills by just giving him more time in jail? I'll put it to you, it's not going to have any effect at all. And I also put it to you that that is the reason, that is the rationale behind this aggravating factor under section number two. It's obvious we just can't have people in jail murdering and just getting more jail time. Because after awhile it just would be meaningless. The punishment would be absolutely meaningless to continue giving someone more jail time for repeated offenses.

And we've already arrived at that repeated offense. And I put it to you that that is a logical and reasonable section of the law which authorizes imposition of the death penalty.

[S-112] And if you look at the other ones . . . granted they don't apply . . . if you look at the other ones and consider them in the context of the death penalty, they're reasonable too. Such as section number one, victim was a law enforcement officer who was murdered while in the performance of his duties. That certainly is a reasonable rationale and is a logical purpose for imposing the death penalty. I'm not going to go through all the others. But I'll tell you the same thing applies to them.

Ladies and gentlemen, the Defense wants you to give Ralph Mills a break. Why should you? Did he give Paul Brown a break? The Defense wants you to give Ralph Mills another chance. Why should you? Did he give Paul Brown any chance at all? The Defense wants you to have mercy on Ralph Mills. Why should you? Did he have any mercy at all on Paul Brown.

Ladies and gentlemen, it takes a special kind of person to do what the Defendant did to Paul Brown on August the 6th, 1984. It takes the kind of person who has absolutely no value at all on the life of another fellow human being. That's the kind of person it takes. And if the death penalty exists to deal with people like Ralph Mills, and if the death penalty is to mean anything in the State of Maryland other than two empty words, this is the proper case for it.

And I'm now going to read you something which you will also be able to read for yourself, but which I believe . . . the [S-113] State believes is very meaningful and proper. Recall my opening statement on the sentencing phase. For a long time the law was getting away from the purpose of the criminal justice system. Not just to enforce the law, but also to punish those who leave behind them victims. You never heard much about the victims. I can't call them . . . by law I can't call them

to the stand to tell you how they feel. By law I can't call the surviving relatives of Paul Brown to tell you how they feel about the fact that Paul Brown isn't around any more, and about the fact that he was murdered. But what I can do is this. I can read you this victim impact statement, and I'm going to do it.

This is a summary of an interview with Paul Brown's brother Thomas and his wife Jean. You remember Jean who testified and had to identify Paul Brown from one of the photographs which is in evidence. This is what it says.

> "Paul and Thomas Brown came from a family of six. At a very young age, they were removed from their parents' custody because of neglect and placed in separate foster homes. Removal by the Department of Social Services was prompted by Paul being hospitalized at age four for anemia and malnutrition.
>
> "Paul was a hyperactive child and hard to handle, which resulted in a lot of beatings from his various guardians. He ran away constantly from the various homes in which he had been placed. [S-114] After a while, Paul, at the age of fifteen, just started living on the streets. He was eventually sent to the Maryland Training School for Boys.
>
> "Paul never really had a home or a family as such. I. . ." Now this is his brother speaking. "I tried to keep in touch with Paul by writing and visiting him whenever possible. I always had good homes and a good life, and always felt guilty that there was nothing I could do to help Paul. After all, I was only one year older than he. Paul was a good person who had a tough life, a lot of bad breaks, no family, no home, nobody to really give him a chance. I sometimes think he felt more secure in prison, because he had no one on the outside. Sure he committed crimes. But he wasn't violent. He did

what he had to do to survive, and he got involved with a lot of bad people."

And that is what is in the victim impact statement. And it's for you to read. It's part of the record in this case.

Ladies and gentlemen, Paul Brown had a right to live. So did the Defendant. But by murdering . . . by murdering Paul Brown in the way that he did, as it's shown in the evidence in this case beyond all reasonable doubt as you found it to be, by doing that I put it to you that Ralph Mills has forfeited his right to live. And, ladies and gentlemen, I ask you to [S-115] impose the ultimate penalty. And you know what that is. And I thank you for your kind attention and for being patient throughout this trial.

Thank you.

BY THE COURT: Mr. Knight.

MR. KNIGHT: May it please the Court.

Mr. Foreman, ladies and gentlemen of the Jury, this is the time of the ultimate decision. Now Mr. Norman has stood here and told you we want an eye for an eye. That's what it sums up to. Someone has killed someone, so lets be just like animals and kill that animal. Well there was a time of day when I subscribed to that theory personally. I do not subscribe to it at this time. Although I would probably sit on a jury, I don't know what I would do if the ultimate decision came. I don't know that you even know at this point what you will do when this ultimate decision comes.

I'm not going to be as nice as I can here. Because we've got to talk about things, and we've got to talk about things that are not exactly pleasant to us.

But first, I want to allude to the statement, the victim impact statement which Mr. Norman read to you. I'm going to tell you quite candidly what else could it say. What else could it say than to be tantamount to a self-serving statement. No one to give him a chance. Well I'm going to talk to you about no one to give Ralph Mills a chance a little [S-116] bit later on. But that's

all I'm going to say about the victim impact statement, because I think that's probably all the worth it has.

The second thing I want to call to your attention, and you're going to read the letter from Sidney J. Wolfe, psychologist, dated January 24th, 1984, wherein it says in the second paragraph I guess, yes, on page two,

> "He is an exceedingly dangerous individual and harbors hostility . . ." and the like.

January the 24th, 1982 (sic) was one more bell ringer to wake the State up. They didn't do a thing with Ralph Mills. They kept. . . They stayed in the daze that they have been in since the time that he first become introduced to the juvenile system, and, as his mother said on the stand, his cry for help by his conduct. Six months. Put him in solitaire (sic). Let him be there. If he's as bad as the doctor says he was and this went into his base file it should have been put there immediately in my estimation. No one cares. That's basically what I'm telling you. The State doesn't care. Someone cares. But not the State of Maryland.

Now I'm going to go over some things here. Some of it's based on testimony. I may seem to be jumping around to you. And I probably am. Because some of these things is going to be as I refresh my memory and recall what happened.

First of all, lets begin with Ralph Mills. He's an [S-117] individual with a low I.Q. His mother indicates he had about a six grade education. She indicates that also at about the age sixteen . . . excuse me . . . age six she began having some problems. By the time he was thirteen, he was in the juvenile system. She was going to school so often before this that some of the people thought she worked there. But what you got to do is put yourself in her place for a few moments. Some of you here I know are mothers, some are fathers. You have to look at this thing in the light that it could happen to you or to one of your children. Because it is a

factual situation, and it's something that has happened in Maryland in the past and will continue to happen to people in the State of Maryland, or anywhere else. It's just one of the mechanisms of our society. We just cannot control everything that we do in all facets of our conduct. We try. That's what the body of law represents, to control the conduct and to make it conform. We have moral ethics, religion, everything else. We do the best we can with what we have. We try. But it fails, and it fails miserably. And the most of the time it fails, it fails those who need the system and the attention the most.

Now she testified in effect that the counseling they had was never with someone that was qualified to treat an individual for some psycho-emotional problem. Now you have to draw probably from your own intellectual capabilities and collective. Just what kind of a guy is Ralph Mills? Some of [S-118] you may be sitting there thinking he's a killer. If you're thinking that, that's a pretty good start. It's probably true. He has done it twice. But the issue is why, and what has been done to prevent it.

Okay. Now, first of all, in the State of Maryland in 1972 the Supreme Court struck down our death penalty act under a case named Furman v. Georgia. And they wrote the law substantially as to what it is now. I read an article by . . . in the Maryland Bar Journal over the weekend. State's Attorneys seeking the death penalty in this State varies from fifty percent in Garrett County, of which Tichnell was one of the cases where a Deputy was shot, or two of them even maybe, to less than five percent, which would be one case out of nineteen in the Baltimore area. You see imposing the death penalty or even ask for the death penalty, cases that are qualified to ask for it, that is where there's aggravating circumstances and that's what I'm talking about where there's aggravating circumstances on those numbers I just quoted you is how much leisure time does the State's Attorneys

office have to attempt to kill someone. I wonder if that should be a criteria. I wonder if it should be a system that if you do this you die there are no exceptions. The State Legislature thought that's probably too cruel. But is it? If we're going to randomly pick some and kill some and not have a very direct and firm system, what is the difference between the two. Someone is going to die [S-119] because they did something; someone else who has done the same thing is not going to die.

I didn't profess when I came up here to know the answers. Mr. Norman feels that he knows the answers and that this man must die. I'm telling you he shouldn't die. Because I don't think the law in my estimation is applied equally to everyone in the State of Maryland. And Mrs. Grove testified wonderfully as to what had happend to Ralph down through the years. She had seen him once, maybe twice. That's another problem with our system. We just do not have the manpower to meet the needs of the people. Mrs. Grove basically indicated to us that Ralph's mother had complained to her about the possibility of additional criminal acts including being killed or killing someone. It was in the pre-sentence investigation. The State of Maryland did nothing. It was in writing.

Now basically Mr. Norman again he said the jail has no effect on Mr. Mills. That's right, ladies and gentlemen. It probably doesn't. Probably killing him would have no effect on him. But jail, he doesn't need jail time. The man needs treatment. There's none of you and Mr. Norman can't say with proper treatment that he cannot function in our society. He needs treatment, not killed. And Mr. Norman anticipated I would say that and I'm saying that now to you. That's what he needs.

Now all the things that ever happened to Ralph Mills from the time that he started criminal offenses got progressively [S-120] worse. Testimony shows that beginning at thirteen. The State of Maryland gave it lip

service, nothing else. That's what Ralph Mills got for his conduct. And I do believe that from a psychological point that he was crying out. I think the criteria sets that almost preferably when his mother indicated that he was crying out.

I'm going to go over this list with you as somewhat in effect Mr. Norman did. Only I'm not going to put as much emphasis on what I think you should . . . where you should draw your conclusions. On the findings and sentence determination, the first page that you look at, down on number two, it keeps saying he was stabbed in the back thirty-nine times, six in the chest. But think of the position of the body when the guards entered the cell. He was lying face down, not face up. So if it was a sneak attack to the back of someone, how does the State know that. It's conjecture. You didn't know during the trial what happened in that cell. You know that someone got killed. And you made a reasonable decision as to who did it. No doubt about that. But don't let the little points like that get away from you. Now that is in the first page as to number two.

I'm going to go back now to the section which is applicable to the Defendant. Mr. Norman covered each one of those with you and told you why that we not have an opportunity to participate or why we should not be able to use or why you [S-121] should say that that's not applicable. Quite honestly we have three of them. And we're going to begin with number five. And Mr. Norman would substitute his judgment for that of the article itself. He wants to say here's a person that young only maybe in chronological age. But he was young in crime. He began young in crime. Ladies and gentlemen, to me that's not the criteria. The thing that you have to mix together is what environment was he in and how did he develop according to the standards of education and morality in our society. Did he live up to what we call the norms of our society or the mores? Okay. No. He didn't have an opportunity. He certainly is not

chronologically or intellectually probably even fifteen years old much less twenty. The evidence showed he was born May the 5th, 1964. He committed a crime in January of 1982. Now in 1984, he was twenty years old. So that put him back a year and a half. Where was his age at that point? Was he too young to really understand what was happening? Even if he knew that he was killing someone, would his age be a factor there? I submit to you that the answer to that is yes. The man was denied an intellectual and social setting wherein he could function.

Maybe it in part was his fault. It may have been. It's not unreasonable to draw that. But it certainly wasn't totally his fault. It certainly was not totally his fault.

The State has indicated along this same line that he [S-122] committed crimes this whole time. Is that the criteria to judge by, the crimes he has committed? Or do we use that section of the law and say the youthfulness of the Defendant, which is what this says, the youthful age of the Defendant at the time. Our age is not only adjudicated by our date of birth, that is chronologically. Our degree of maturity is intellectual as well. And I'm telling you here, although we have, someone chronologically of lawful age, eighteen, and that's not binding upon you, I would submit that the man was not of the age to understand, and that youthfulness should be a factor.

The next one I come to is number seven. Now here is one that's going to hurt you as a member of society, me, and everybody else that has to resolve and becomes involved in this type problem. It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society. Well Mr. Norman says there's people around that he can have contact with and people that he can kill. But I have heard so many times the politicians, the lawyers, the judges, lay people, all walks of life that an institution

is for warehousing individuals. And ironically enough that is exactly one of the problems here. They decided to warehouse Mr. Mills instead of doing something to help him.

Now I'd be foolish to stand here and say that it's not a problem, practically as well as one of economics. The State of Maryland probably doesn't have the money to treat [S-123] everyone that should be treated. But the State's going to step in and take you from the cradle to the grave when everything's going well and they're getting your tax money. Shouldn't they be just as responsible for you when you're locked up and put away somewhere? Warehousing is not the answer. Killing people is not the answer. The only answer is educate people. Education is probably the greatest asset that mankind has developed in a system of education on his own probably in the history of our societies and of man himself. We have to educate our people. There's not a one of you here that don't want your children educated. This is a special type of education, ladies and gentlemen. It's an education that will make a defective person either emotionally or conduct educate them to put them back in. After all, normal is only what we perceive in our frame of reference. And if each of you were tested, some of you against each other, you would feel that you fell outside what is normal in your frame of reference.

I think it's unlikely that Mr. Mills will ever do this again. I think it's very unlikely. I think there's two reasons. I think now the State knows it after all the cries, after their own investigations that they've probably come to realize that there are people like this. The guards can tell you who the people are, but no one will take the time to say, point out these potential hazards. The probation officers knew. The mother continued to tell them about Ralph Mills. [S-124] But nobody does anything. The old adage, locked the barn after the horse is stolen.

I'll now allude to number eight. Mr. Norman has said that Mr. Knight will say or Mr. Stillrich will say the

State has not done their bit. Okay, I have a statement on that. The State has not done their bit. They absolutely have not. I have alluded to it over and over here, I have told you and told you. The clear beyond any doubt, the flag, January the 24th, 1984, Sidney J. Wolfe, psychologist, Patuxent, psychological profile on Ralph Mills. He's very dangerous and will commit homicide. The result, ignore it. That's what they did. Now lets kill him. I don't think it flies in the face of what I would call reasonable degree of mercy that every person should be endowed with. It's a pathetic situation when the only thing the State Prosecutor can do or his office . . . and it's nothing personal against anyone . . . that can come into court and say kill this poor bastard because he hasn't conformed to our standards of conduct. Where are we going from there? What does that do? Want to know how many people have been killed in Maryland since Furman? None. 1972. Not a one under this law.

Now I want to tell you a story in closing. It's about the SPCA of all things. Because we want to treat a human being like he's a dog apparently, I may as well tell you a little story. When I was a little boy, I used to be jealous [S-125] of some dogs that people had, because a dog had it better than I did. Excuse me a minute. (Pause) I lived down near Big Pool, one of eleven children during the depression. I grew up not liking dogs too well, but I understood it. And I understand it now, so I have no problem. I've educated myself. But then I go out and somebody says you're being cruel to that animal. I'm calling the SPCA. Big thing down home. I have a lady down there I mean she'll run out day or night like the police would for a death of a human. So what do they do? They come, take your dog from you, and they put it in the SPCA. Well the conscience of the person who called the SPCA that's wonderful. Now they've done their thing in society, because they've had the dog put in the SPCA. But the SPCA, just like everyone else, has monetary problems. So they say we'll

keep this dog ninety days, and we'll warehouse him. Number seven up here. We'll warehouse this dog for ninety days. If nobody claims him, we're going to kill him. That citizen feels okay because he did his duty. Someone mistreated the dog; the SPCA come and picked the dog up and it was put away. And what do they do? The SPCA, the protector of the animals, goes out and kills him. If we want the same treatment, do Ralph Mills that way. Because the State is the protector of us. And if someone does something wrong, or gets in the wrong position, they warehouse him for awhile, and then if he continues his conduct they kill him. If it be a mean old junkyard dog as they call [S-126] them, it would be the same thing.

I've been up most of the night thinking what I was going to tell you. Probably haven't told you much of it, because most of the things I've told you came from my mind and the heart right here and now. You have within your discretion under section 413 to raise any issue that you feel that you can raise as another mitigating circumstance under section 8. The Judge told you we don't play numbers here. All you have to do is select one of those numbers I have suggested to you because I think that's fair, and I think that's where the areas are of concern. I think they're reasonable. And you have to say to yourself, does that outweigh all the other marks for imposing the death penalty. And if you would, again Mr. Norman alluded to this very dangerous crime of number two. I'd just like for you to take the time while you're in that jury room and compare all of them to each other. I think number two would be the least offensive to the people of the State of Maryland.

I thank you for your time. I hope you well, especially the two alternate jurors. Because they sit here and they're probably much happier than you are that they don't have to participate in this exercise you're about to undertake. Don't kill Ralph Mills.

BY THE COURT: Ladies and gentlemen, I'm going to have Mr. Walker give your Foreman the original copy of the [S-127] form to be used. You may keep your own individual copies, but I will ask you to return them after deliberations have been completed.

Let me remind you that with . . . as you consider each of the circumstances you must indicate yes or no, however your unanimous decision falls. You must indicate either yes or no as to each of those circumstances.

Again, as I advised you yesterday, should you have any questions or messages during your deliberation your Foreman should write them out, deliver them to the Bailiff, who will deliver them to me. I will, in view of the hour, instruct the Bailiff to, as soon as you assemble upstairs, to take a lunch order for you, and we will have lunch provided, brought in for you.

Swear the Bailiff.

(Bailiff sworn.)

BY THE COURT: And Mrs. Durst and Mrs. Keller, you are again excused with my thanks. And I would ask you please until the case has been concluded do not discuss the case with anyone, and don't permit anyone to discuss it with you.

(Jury retires to deliberate 1:05 P.M.)

(The Jury returned to the Courtroom at 3:20 P.M. and the following ensued:)

(Roll Call of Jurors)

BY THE CLERK: Ladies and gentlemen of the Jury, are [S-128] you agreed of your report? Return it to the Court, sir.

(Handed)

BY THE COURT: Counsel, with respect to section one, aggravating circumstances, the Jury finds, in accordance with my instructions, has answered no to num-

ber one and three through ten, has found aggravating circumstance number two beyond a reasonable doubt.

With regard to mitigating circumstances, the Jury has answered indicating that they have not been proved by a preponderance of the evidence, numbers one through seven all have been answered no. They have found in addition no other mitigating circumstances.

Ladies and gentlemen, however, you have neglected to complete section three indicating that you . . . whether or not you believe the mitigating circumstances do or do not outweigh the aggravating circumstances. I will have to ask you to return to the Jury room and authorize your Foreman to complete that section to conform with the requirements of the statute, following which I will then complete the taking of your verdict and announce to the Court your ultimate decision.

MR. LONG: Your Honor, excuse me, before the Jury leaves . . .

BY THE COURT: Just a moment. Yes, Mr. Long.

Just return to the box ladies and gentlemen if you would for a moment.

[S-129] (Counsel, and the Defendant approached the bench and the following ensued:)

BY THE COURT: It's automatic though isn't it?

MR. LONG: I suspect what they're doing . . .

BY THE COURT: All right. Okay.

MR. LONG: . . . hung up on that language, Your Honor.

(Counsel and the Defendant return to the trial tables and the following ensued:)

BY THE COURT: Ladies and gentlemen, perhaps I'm in error. If you would just be seated for a moment.

All right. I'm in error. You have completed the form in accordance with my instructions. So if you'll return it to me. Excuse me very much. There is no need for you to complete section three.

All right. Having then made a determination that you did, having found one aggravating circumstance, no mitigating circumstances, in accordance with the instructions then contained on the form, you have unanimously according to your determination determined the sentence to be death. And I will ask the Clerk to ask counsel if counsel wishes the Jury to be polled.

MR. KNIGHT: Yes, Your Honor.

BY THE COURT: The Clerk will poll the Jury.

(In response to the question, "You have heard the determination of the sentence as the Foreman [S-130] has stated. Is yours the same?", each individual juror responded in the affirmative.)

BY THE CLERK: Ladies and gentlemen of the Jury, hearken to your determination of sentence as given by the Court, and so say you all.

(All jurors answer in the affirmative.)

BY THE COURT: Ladies and gentlemen, I will now excuse you. Again I thank you for your service. And those of you who are on the regular jury panels, please remember that your term extends through the balance of this month, so you would please call as you are supposed to be calling for your instructions on a week-to-week basis. Thank you again for your service. You may now be excused.

(Jurors leave Courtroom)

BY THE COURT: Before sentence is pronounced formally, gentlemen, is there any . . . anything from the State or from the Defendant?

MR. LONG: The State has nothing further to add, Your Honor.

BY THE COURT: Mr. Knight.

MR. KNIGHT: No, Your Honor.

BY THE COURT: All right. The Jury having determined in this case that the death penalty is the appro-

priate sentence, and the Court being bound by that determination, the sentence of the Court in this case, No. 2609 Criminal Trials, is that [S-131] the Defendant, Ralph William Mills, shall suffer the penalty of death by the administration of lethal gas as prescribed by law. The Defendant will be held in confinement and be delivered to the Warden of the Maryland Penitentiary. The Warden is hereby directed to execute the sentence during the week beginning Monday, November 4, 1985, upon some day within that week as prescriber by law.

A stay of execution of sentence will be ordered by me to allow the automatic review by the Court of Appeals as mandated by Article 27, Section 414.

Is there anything else today, gentlemen? The stay will be prepared and forwarded today.

Anything else, gentlemen?

MR. KNIGHT: No, Your Honor.

MR. LONG: No, Your Honor.

IN THE CIRCUIT COURT
FOR ALLEGANY COUNTY, MARYLAND

(Title Omitted in Printing)

FINDINGS AND SENTENCING DETERMINATION

Section I

Based upon the evidence we unanimously find that each of the following aggravating circumstances which is marked "yes" as been proven BEYOND A REASONABLE DOUBT and each aggravating circumstance which is marked "no" has not been proven BEYOND A REASONABLE DOUBT:

1. The victim was a law enforcement officer who was murdered while in the performance of his duties.

____	X
yes	no

2. The defendant committed the murder at a time when he was confined in a correctional institution.

X	
____	____
yes	no

3. The defendant committed the murder in furtherance of an escape from or an attempt to escape from or evade the lawful custody, arrest or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.

____	X
yes	no

4. The victim was a hostage taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.

____	X
yes	no

5. The victim was a child abducted in violation of Code, Article 27, § 2.

____	X
yes	no

6. The defendant committed the murder pursuant to an agreement to contract for remuneration or the promise of remuneration to commit the murder.

____	X
yes	no

7. The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

____	X
yes	no

8. At the time of the murder, the defendant was under the sentence of death or imprisonment for life.

____	X
yes	no

9. The defendant committed more than one offense of murder in the first degree arising out of the same incident.

____	X
yes	no

10. The Defendant committed the murder while committing or attempting to commit robbery, arson or rape or sexual offense in the first degree.

____	X
yes	no

(If one or more of the above are marked "yes", complete Section II. If all of the above are marked "no", do not complete Sections II and III.)

Section II

Based upon the evidence we unanimously find that each of the following mitigating circumstances which is marked "yes" has been proven to exist by A PREPONDERANCE OF THE EVIDENCE and each mitigating circumstance marked "no" has not been proven by A PREPONDERANCE OF THE EVIDENCE:

1. The defendant previously (i) has not been found guilty of a crime of violence; and (ii) has not entered a plea of guilty or nolo contendere to a charge of a crime of violence; and (iii) has not been granted probation on stay or entry of judgment pursuant to a charge or a crime of violence. As used in this paragraph, "crime of violence" means abduction, arson, escape, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery, or rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.

____	X
yes	no

2. The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

	X
yes	no

3. The defendant acted under substantial duress, domination or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution.

	X
yes	no

4. The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder or emotional disturbance.

	X
yes	no

5. The youthful age of the defendant at the time of the crime.

	X
yes	no

6. The act of the defendant was not the sole proximate cause of the victim's death.

	X
yes	no

7. It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

	X
yes	no

8. Other mitigating circumstances exist, as set forth below:

None.

(If one or more of the above in Section II have been marked "yes", complete Section III. If all of the above in Section II are marked "no", you do not complete section III.)

Section III

Based on the evidence we unanimously find that it has been proven by A PREPONDERANCE OF THE EVIDENCE that the mitigating circumstances marked "yes" in Section II outweigh the aggravating circumstances marked "yes" in Section I.

yes	no

DETERMINATION OF SENTENCE

Enter the determination of sentence either "Life Imprisonment" or "Death" according to the following instructions:

1. If all of the answers in Section I are marked "no" enter "Life Imprisonment".

2. If Section III was completed and was marked "yes" enter "Life Imprisonment".

3. If Section II was completed and all of the answers were marked "no" then enter "Death".

4. If Section III was completed and was marked "no" enter "Death".

We unanimously determine the sentence to be Death.

/s/ John E. Ravensunoft
Foreman

/s/ Elizabeth A. Hardesty
Juror 2

/s/ Robert C. Markham
Juror 3

/s/ Virginia S. Martirans
Juror 4

/s/ Robert S. McCutcheon
Juror 5

/s/ Virginia Fisher
Juror 6

/s/ Charles Paul Montgomery, Jr.
Juror 7

/s/ Mary M. Olsen
Juror 8

/s/ Betty F. Pugh
Juror 9

/s/ Wilma Smith
Juror 10

/s/ Tina M. Warnick
Juror 11

/s/ Robert R. Druchett
Juror 12

IN THE CIRCUIT COURT
FOR ALLEGANY COUNTY, MARYLAND

(Title Omitted in Printing)

REPORT OF TRIAL JUDGE—SENTENCING

I *Defendant*

A. Date of Birth: May 5, 1964

B. Sex: Male

C. Race: Caucasian

D. Address: 3727 East Lombard Street
Baltimore, Maryland 21224

MCI
Hagerstown, Maryland 21740

E. Length of Time in Community: Defendant has always lived in East Baltimore, except for those times when he was committed to Juvenile facilities or incarcerated.

F. Reputation in Community: Poor.

G. Family Situation and Background:

1. At the time of the offense Defendant was incarcerated. He is married, with no known children.

2. See attached pages prepared by the Division of Parole and Probation.

H. Education: Withdrew from school at about age 13.

I. Work Record: None.

J. Prior Criminal Record: See attached pages.

K. Military History: None

L. Physical/Mental Characteristics:

Physical: Defendant suffers no known physical disabilities.

Mental: Defendant has been diagnosed as suffering

(1) attention deficit disorder

(2) mixed substance abuse

(3) antisocial personality

M. Other Significant Data: None.

II *Data Concerning Offense*

A. The offense occurred on August 6, 1984, at the Maryland Correctional Institution in Washington County, Maryland in a cell occupied only by the Defendant and the victim. The victim was stabbed 45 times (six times in the chest and 39 times in the back) with a homemade knife. The evidence strongly suggests that he was asleep when attacked.

B. There was no evidence of the Defendant being under the influence of drugs or alcohol.

C. The Defendant and the victim had been cellmates for 12 days. There is no evidence of a prior acquaintance.

D. No.

E. Victim.

1. Paul Robin Brown
2. D.O.B. September 10, 1959
3. Male
4. Caucasian
5. Unknown
6. Unknown

III

A. The Defendant entered pleas of not guilty and not criminally responsible. He offered no evidence in support of the latter and the issue was not given to the jury.

B. Defendant was tried by a jury. No challenge to jury composition or selection was made.

C. George W. Knight, Jr.
120 West Washington Street
Hagerstown, Maryland

Frank D. Stillrich
100 West Patrick Street
Frederick, Maryland

Both counsel are Assistant Public Defenders and both entered their appearances at the initial stages.

D. No issue of pre-trial publicity was raised. Change of venue was based upon Rule 4-254(b)(1).

E. No other charges were filed.

IV *Sentencing*

A. No. 2 (Art. 27, Sec. 413(d)(2))

B. Sentencing was conducted before the same jury.

C. Same counsel.

D. Aggravating—No. 2
Mitigating—Nos. 5 and 7—none found by jury.

E. Aggravating—No. 2
Mitigating—Nos. 1 through 7.

F. Death Penalty.

V *Chronology*

Date of Offenses: August 6, 1984
Arrest: August 8, 1984

Charge: Murder
Notification: October 3, 1984
Trial: February 25-March 4, 1985
Sentencing: March 5, 1985
Sentence Imposed: March 5, 1985

VI I agree with the jury's Findings and Determination. There was evidence from which the jury could have found the existence of Mitigating Circumstance No. 5 (youthful age); however, in my opinion that circumstance would not have outweighed the Aggravating Circumstance by a preponderance of the evidence.

VII Findings and Sentencing Determination Attached.

/s/ J. Frederick Sharer
J. FREDERICK SHARER

I certify that on the 7th day of March, 1985 I have caused to be delivered to George W. Knight, Jr. and Frank D. Stidrich, counsel for Defendant, and M. Kenneth Long, Jr. and Andrew G. W. Norman, State's Attorney, and Assistant State's Attorney, copies of this report and that any comments made by them have been attached hereto.

/s/ J. Frederick Sharer
J. FREDERICK SHARER

COURT OF APPEALS OF MARYLAND

Nos. 22 & 79, Sept. Term 1985

RALPH WILLIAM MILLS

v.

STATE OF MARYLAND

June 25, 1987

Argued before MURPHY, C.J., and SMITH,* ELDRIDGE, COLE, RODOWSKY, COUCH* and McAULIFFE, JJ.

ELDRIDGE, Judge.

In March 1985 Ralph William Mills was tried for first degree murder before a jury in the Circuit Court for Allegany County. His appeal challenges the resulting conviction and death sentence. We shall affirm.

The parties have agreed pursuant to Maryland Rule 828(g) that the following facts are relevant to the disposition of this appeal. Mills shared cell number 20 on "G-One" tier at the Maryland Correctional Institution in Hagerstown with Paul Robin Brown. At 10:47 p.m. on August 6, 1984, correctional officers were called to the cell to investigate a disturbance. When the officers arrived, Mills demanded to be released from his cell, say-

---

* Smith and Couch, JJ., now retired, participated in the hearing and conference of this case while active members of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, they also participated in the decision and adoption of this opinion.

ing, "my cell buddy is dead." The cell door was opened and Mills emerged, carrying a blood-covered "shank," or home-made knife, at his side. Mills stated several times that he had "killed his cell buddy." Brown's body was found lying on his bunk, stabbed six times in the chest and thirty-nine times in the back.

About three weeks before this homicide, Mills had written to the warden, threatening to kill his cell mate (who at that time was not Paul Robin Brown) if certain complaints, primarily concerning visitation, were not satisfactorily resolved. At the trial another inmate, David Gallahan, testified for the defense that Brown had lent him the murder weapon prior to the homicide, and had asked for and received it back on the day of the incident.

Mills presents us with numerous questions for review, some relating to the guilty verdict and some relating just to the sentence of death.

I.

The first two questions presented concern the denial of Mill's motions to strike two prospective jurors for cause. Mills's counsel conceded in this Court that Mills had exercised only sixteen of his allotted twenty peremptory challenges.[1] Neither of the prospective jurors whom Mills moved to strike for cause was impanelled to serve as a juror or to serve as an alternate.

Assuming for purposes of argument that the trial judge should have dismissed the two veniremen for cause, it is difficult to understand how his failure to do so could have prejudiced Mills when the defendant's peremptory challenges were not exhausted and the two veniremen were not seated. We have previously stated that when

[1] Maryland Rule 4-313(a) provides that defendants in cases such as this are permitted twenty peremptory challenges plus two additional peremptory challenges for each alternate juror.

an accused has not exhausted his peremptory strikes, failure to disqualify a prospective juror for cause is not reversible error. *White v. State*, 300 Md. 719, 728, 481 A.2d 201 (1984), *cert. denied*, 470 U.S. 1062, 105 S.Ct 1779, 84 L.Ed.2d 837 (1985). *See Booth v. State*, 306 Md. 172, 185, 507 A.2d 1098 (1986), *vacated on other grounds*, —— U.S. ——, 107 S.Ct. 2529, 95 L.Ed.2d —— (1987).

We have also repeatedly held that a claim of error in the inclusion or exclusion of a prospective juror is ordinarily abandoned when the defendant or his counsel indicates satisfaction with the jury at the conclusion of the jury selection process. *Booth v. State*, *supra*, 306 Md. at 185, 507 A.2d 1098; *Foster v. State*, 304 Md. 439, 450-451, 499 A.2d 1236 (1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 3310, 92 L.Ed.2d 723 (1986); *Thomas v. State*, 301 Md. 294, 310, 483 A.2d 6 (1984), *cert. denied*, 470 U.S. 1088, 105 S.Ct. 1856, 85 L.Ed.2d 153 (1985); *White v. State*, *supra*, 300 Md. at 729, 731, 481 A.2d 201; *Calhoun v. State*, 297 Md. 563, 579-580, 468 A.2d 45, 52 (1983); *cert. denied*, 466 U.S. 993, 104 S.Ct. 2374, 80 L.Ed.2d 846 (1984). In this case, after the voir dire and peremptory strikes, the defense was asked if the jury panel was acceptable to the defendant. After checking the identity of one juror, defense counsel stated: "Your Honor, the Jury as impaneled is acceptable to the Defense." Under these circumstances it would be idle for us to consider whether or not the trial court should have struck the two veniremen for cause.

II.

Mills contends that the trial court should not have admitted into evidence two color photographs of the victim, showing his stab wounds and blood.

At trial this issue developed as follows. The first photograph admitted into evidence (State's Exhibit 3) was a color photograph of the prison cell wall above the

victim's bunk. The photograph depicts three words fingerpainted in blood as well as a portion of the victim's body. Counsel for the defendant objected that the photograph "[s]hows some bias being a color photograph like it is," and argued that the State should produce a black and white photograph. The trial judge asked: "You concede that the fact that it's color doesn't automatically exclude it?" Counsel for the defendant responded, "I agree." The judge then ruled that if the State could establish that the colors were accurate, the photograph would be admitted into evidence, and afterwards it was so admitted.

The next photographs in evidence (State's Exhibits Nos. 5, 6, 7, 8, 9, 10) were admitted one after another, and resembled the first photograph in size, and coloration. Exhibit 5 depicted the feet of the victim, in socks; no blood was apparent. There was no objection to Exhibit 5 from defense counsel. Exhibit 6 showed the toilet in Mills's cell as it appeared when the homicide was first investigated, with red stained pieces of white cloth or paper visible in the toilet bowl. Defense counsel objected to Exhibit 6. Exhibit 7 showed a corner of the cell, including the window, a cabinet, some clothes drying from a string, and the hand of the victim. No objection was made to the admission of this photograph. Exhibit 8 showed the back of the victim with blood draining from stabbings scattered from the shoulders to the waist level. Defense counsel objected to the admission of Exhibit 8. Exhibit 9 showed the face and chest of the victim, with blood draining from wounds, and there was no objection to this photograph. Exhibit 10 showed the victim lying face up on his bunk and showed part of the wall containing three words fingerpainted in blood. Blood could be seen, but not specific wounds. There was no objection with respect to Exhibit 10.

The trial court admitted Exhibits 5, 7, 9 and 10 into evidence, there being no objection to them. The court

postponed consideration of Exhibits 6 and 8, which were objected to, until after the completion of the testimony of the witness who identified and vouched for the accuracy of all six photographs. With the jury excused from the courtroom, the court turned to the two challenged photographs. Mills moved to exclude the photograph of the toilet (Exhibit 6) and the photograph of the victim's back (Exhibit 8), arguing that the photographs would needlessly prejudice the jury, as the pictures reflected facts which were not disputed and which, it was claimed, could have been easily established by testimony and less vivid photographs.

The State pointed to testimony that all of the photographs were fair and accurate. With respect to the picture of the toilet, the State contended that it would not "unduly inflame" the jurors and that its probative value outweighed its prejudicial value. As to the picture of the victim's back wounds, the State argued that it "completes the picture" by showing to the jury wounds not visible in the previously admitted pictures of the victim lying face up, and that it was the only photograph of the back wounds.

The trial judge admitted the challenged photographs, ruling as follows:

> "Well, the purpose of the . . . introduction of photographic evidence is to enable the side which offers it to offer probative evidence to the triers of fact, to the jurors. I know of no rule of evidence that requires me to guard the sensibilities of jurors whether we know what they are or not. I think the issue is whether or not that photograph would tend to inflame the jurors to in any way provide an exhibit or a bit of evidence in a sensational way. I think if the State sought to introduce eight photographs taken from slightly different angles, or to a series of photographs one of each area where there's a wound, then yes I think it would be potentially

> inflammatory. But to offer one single photograph of the . . . [victim] as he was found, be it in color or black and white, I don't think is unduly prejudicial and designed to inflame, and I don't think it will inflame.
>
> "I'll overrule the objection and permit all the exhibits to come in."

On appeal, Mills contends: "Over objection, the trial court admitted State's Exhibits Eight and Nine." (Brief, p. 12). The actual objection was, "We would object to the No. 8 [the back wounds], Your Honor, along with No. 6 [the toilet bowl]. As to the others we have no objection." Accordingly, the present contention of error in the admission of the State's Exhibit 9, showing the face and chest of the victim, was clearly waived. *See* Rule 4-322. Moreover, even if No. 9 had been objected to, it is much less bloody and had much less potential for prejudice than No. 8. As we shall conclude that the admission of No. 8 furnishes no ground for reversal, the same conclusion is applicable to the admission of No. 9.

Mills and the State agree that the admissibility of photographs turns upon a balancing of their probative value against their potential for prejudice, and that the application of this test is a matter committed to the discretion of the trial judge. *See, e.g., State v. Tichnell*, 306 Md. 428, 463, 509 A.2d 1179 (1986); *Grandison v. State*, 305 Md. 685, 729, 506 A.2d 580, *cert. denied*, —— U.S. ——, 107 S.Ct. 38, 93 L.Ed.2d 174 (1986); *Reid v. State*, 305 Md. 9, 20, 501 A.2d 436 (1985); *Johnson v. State*, 303 Md. 487, 502-504, 495 A.2d 1 (1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 868, 88 L.Ed.2d 907 (1986), and cases there cited. The standard was set forth in *Johnson v. State, supra*, where this Court found no error in the admission of a color photograph and black and white photographs of a homicide victim. We there stated as follows (303 Md. at 502, 495 A.2d 1):

> "We have consistently held that whether or not a photograph is of practical value in a case and admissible at trial is a matter best left to the sound discretion of the trial judge. *Bowers v. State*, 298 Md. 115, 135-36, 468 A.2d 101, 111-12 (1983), quoting *Cook v. State*, 225 Md. 603, 608, 171 A.2d 460, 463 (1961), *cert. denied*, 368 U.S. 970, 82 S.Ct. 445, 7 L.Ed.2d 398 (1962). A court's determination in this area will not be disturbed unless plainly arbitrary. *Id.* Under this standard, we have permitted the reception into evidence of photographs depicting the condition of the victim and the location of injuries upon the deceased, *Clark v. State*, 238 Md. 11, 21-22, 207 A.2d 456, 461-62 (1965); the position of the victim's body at the murder site, *Brice v. State*, 264 Md. 352, 368-69, 286 A.2d 132, 140 (1972); and the wounds of the victim, *Madison v. State*, 200 Md. 1, 7-8, 87 A.2d 593, 595 (1952). On certain occasions, photographs have also been admitted to allow the jury to visualize the atrociousness of the crime—a circumstance of much import where the factfinder must determine the degree of murder. *See Fuller v. State*, 45 Md.App. 414, 420-21, 413 A.2d 277, 280-81 (1980).
>
> * * * *
>
> We have previously held that photographs of the deceased are admissible even where the location of injuries was previously described and conceded by the defendant. *Smith v. State*, 182 Md. 176, 187, 32 A.2d 863, 867 (1943); *Snowden v. State*, 133 Md. 624, 631, 106 A. 5, 8 (1919). The Court reasoned that since the photographs were mere representations of what was already in evidence, their introduction could not be held to have injured the accused. *Smith*, 182 Md. at 187, 32 A.2d at 867."

Mills contends that "the more shocking the photo, the more important must be its contribution to the case in

order for admission to be justified." (Brief, p. 13). He argues that Exhibit 8 added nothing of substance to the State's case, because the medical examiner and other witnesses testified as to the stabbings and because this testimony was never controverted. The State responds that any prejudice caused by the photograph was justified by its probative value on the issues of premeditation and provocation.

We are unable to conclude that Exhibit 8 was likely to so distort the jury's deliberations that its admission was "plainly arbitrary," *Johnson, supra*, 303 Md. at 502, 495 A.2d 1. When the State sought to admit the photograph, no stipulation had been offered that the victim had been stabbed six times in the chest and thirty-nine times in the back. Mills does not contend that the photograph in any way misrepresented facts. We have examined Exhibit No. 8 and do not find it particularly gory or gruesome. Compare the photograph at issue in *Smith v. State*, 182 Md. 176, 187, 32 A.2d 863, 867 (1943) (upholding the admission of a photograph showing the victim's body partially exhumed one week after fatal axe blows to the head, even though the facts represented were already in evidence without objection and were not disputed).

In this Court, Mills also contends that the trial judge should not have allowed Exhibits 8 and 9 to be reintroduced in evidence at the sentencing proceeding. Before the jury was returned for this phase of the trial, the State announced that it would move to reintroduce all trial testimony and exhibits. Counsel for defendant made sure that two exhibits marked for identification but not introduced would be kept from the jury, but, when asked by the court if he had any objection to the reintroduction of the trial exhibits and documents, counsel replied: "No, Your Honor." Mills has obviously waived the point. Rule 4-322(a).

III.

Next, Mills argues that the trial court erred in excluding evidence of the victim's character and reputation.

As we recently pointed out in *Mack v. State*, 300 Md. 583, 603-604, 479 A.2d 1344 (1985), whether the exclusion of evidence constituted reversible error is ordinarily not preserved for review "unless there has been a formal proffer of what the contents and relevance of the excluded testimony would have been." *See Peregoy v. Western Md. R.R. Co.*, 202 Md. 203, 209, 95 A.2d 867 (1953). The record shows that no such proffer was made in this case.

Conceding the absence of a proffer, Mills surmises on appeal that trial counsel made "an apparent effort to establish that Brown was the aggressor in the altercation with appellant" and "sought to elicit evidence that Brown had both assaultive and homosexual tendencies" of the sort that "could well have led the jury to believe that appellant's act was not premeditated and unprovoked." (Brief, pp. 15, 17, 18). Even now, however, Mills does not contend that *any* of the witnesses would have testified that Mills struck at Brown in self defense or retaliation because of homosexual advances. We are left with appellate counsel's mere speculation in his brief that "some aspect of the victim's character and personality led to his demise." (*Id.*, p. 20).[2] Something more than this type of vague speculation is required before we can conclude that the trial judge erred in excluding the evidence.

---

[2] With regard to the evidentiary foundation which must be laid before evidence of a victim's character is admissible to support a claim of self defense, *see Thomas v. State*, 301 Md. 294, 306-307, 483 A.2d 6 (1984), *cert. denied*, 470 U.S. 1856, 105 S.Ct. 1856, 85 L.Ed.2d 153 (1985).

The principle that ordinarily the record must contain a "proffer to show precisely what the testimony, if admitted, would have established," does have an exception "where the tenor of the questions and the replies they were designed to elicit is clear," *Peregoy v. Western Md. R.R. Co., supra*, 202 Md. at 209, 95 A.2d 867. In the instant case, it is far from clear that anything relevant might have been established by defense counsel's questions at trial concerning the victim's character.

Moreover, appellate counsel's speculation in this Court that the homicide might have been in self defense or in retaliation for a homosexual advance, in addition to not being reflected in a proffer or the tenor of the questions, is squarely contrary to all of the evidence. Before the killing Mills wrote to the Warden threatening to kill his cell mate if his visitation privileges were curtailed. Some weeks later Mills took his cell mate's "shank," put on a glove to improve his grip, and stabbed the cell mate forty-five times on his chest and back as he lay on his bunk. The cell showed no sign of any struggle. Before being let out of the cell, Mills fingerpainted the words "Helter Skelter's Son" in blood on the cell wall. On being let out, Mills told the guards that he killed his cell mate. In the absence of a proffer, it would appear beyond doubt that Paul Brown's character was irrelevant and that testimony on this subject was properly excluded.

IV.

The defendant Mills also argues that the trial judge erred in sustaining objections to certain questions which defense counsel asked the witness James Mills, who was the defendant's uncle and was a fellow inmate. The record on this point reads as follows:

"Q Well first before I get into that let me ask you something else. You indicated that you saw Mr. Mills on the tier on an almost daily basis?

"A Yes.

"Q How would you characterize his conduct in the institution?

"PROSECUTING ATTORNEY: Objection.

"BY THE COURT: Objection sustained.

"Q During the time that you were on G cell with Mr. Mills, do you know whether or not he had any trouble with the guards or other inmates?

"PROSECUTING ATTORNEY: Objection.

"A None at all.

"BY THE COURT: Just a minute, Mr. Mills. When you hear an objection, please don't answer the question.

"Objection sustained.

"Q Did you ever personally see any altercation with Ralph Mills between Ralph Mills and any of the guards?

"PROSECUTING ATTORNEY: Objection.

"BY THE COURT: Objection sustained.

"Q Did you ever personally see any altercation between Ralph Mills and any of the other inmates?

"PROSECUTING ATTORNEY: Objection.

"BY THE COURT: Objection sustained."

The defendant asserts in this Court that the purpose of the questions was to elicit evidence concerning the defendant's nonviolent character and reputation. *See* Maryland Code (1974, 1984 Repl. Vol.), § 9-115 of the Courts and Judicial Proceedings Article, allowing a witness to give his personal opinion of another person's character where character evidence is relevant;[3] *Durkin v. State*,

[3] Section 9-115 states as follows:

"Where character evidence is otherwise relevant to the proceeding, no person offered as a character witness who has an adequate basis for forming an opinion as to another person's

284 Md. 445, 397 A.2d 600 (1979). *See also Poole v. State*, 295 Md. 167, 181, 453 A.2d 1218 (1983); *Comi v. State*, 202 Md. 472, 478-479, 97 A.2d 129, *cert. denied*, 346 U.S. 898, 74 S.Ct. 223, 98 L.Ed. 399 (1953). The defendant, however, frankly acknowledges that the above questions were "not couched . . . in . . . terms . . . [of] the character and reputation of Appellant for violence." (Brief, p. 22).

As the questions were not worded in terms of character evidence, as the witness was not asked to give an opinion concerning the defendant's character or reputation, and as there was no proffer or explanation given to the trial judge by defense counsel, we cannot conclude that the trial judge committed error in sustaining the objections.

Furthermore, even if it be assumed arguendo that the trial court did err in sustaining the objections, such error would be harmless. In light of the overwhelming evidence of the defendant's guilt and the nature of his crime, it is virtually inconceivable that the view of a fellow inmate, who was the defendant's uncle, that the defendant has previously been nonviolent in the institution, might have changed the guilty verdict. We are convinced, "beyond a reasonable doubt, that the error in no way influenced the verdict,"[1] *Dorsey v. State*, 276 Md. 638, 659, 350 A.2d 665, 678 (1976). "[T]here is no reasonable possibility that the [exclusion of the] evidence . . . may have contributed to the rendition of the guilty verdict." *Ibid.*

V.

Mill's next contention is that the trial court erred in denying his motion to impanel separate juries for the

---

character shall hereafter be excluded from giving evidence based on personal opinion to prove character, either in person or by deposition, in any suit, action or proceeding, civil or criminal, in any court or before any judge, or jury of the State."

guilt or innocence phase and the penalty phase of his trial. Mills's argument is identical to that rejected by the Supreme Court in *Lockhart v. McCree*, —— U.S. ——, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986), and rejected by this Court in several cases. *See State v. Tichnell*, *supra*, 306 Md. at 458, 509 A.2d 1179; *Booth v. State*, *supra*, 306 Md. at 192; *Evans v. State*, 304 Md. 487, 522, 499 A.2d 1261 (1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 3310, 92 L.Ed.2d 722 (1986); *Foster v. State*, *supra*, 304 Md. at 453-466, 499 A.2d 1236. These cases are dispositive of the issue.

VI.

A.

The defendant's principal argument is that the Maryland capital punishment statute, as applied, is unconstitutionally mandatory. Mills's analysis begins with Code (1957, 1982 Repl. Vol.), Art. 27, § 413(h)(2), which provides as follows:

> "If it [the court or jury] finds that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death."

Former Maryland Rule 772A, in effect at the time of the defendant's trial, implemented the statutory provision by giving the jury a form to fill out. The instructions on the form told the jury that if one or more aggravating circumstances were present, and if no mitigating circumstances were found, the jury should enter "Death" on the part of the form for the sentence. In the present case, the jury found that one aggravating factor had been established, namely that Mills was an inmate in a correctional institution at the time he committed the murder. The jury found no mitigating circumstance, and it determined that the sentence should be death.

Relying primarily on *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 974 (1976), and

Roberts v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976), Mills maintains that "any statutory scheme which requires the return of a death sentence without providing the sentencer with an option to impose a life sentence is invalid." (Brief, p. 47). In this case, according to Mills, once the jury found one aggravating circumstance and no mitigating circumstances, the statute required the jury to return a sentence of death. Mills suggests that, although no mitigating factors were found, "there is nothing in the record to indicate that had the jurors been given a choice, any one of them would have considered the ultimate sanction appropriate." (*Ibid.*). Because, in the defendant's view, the Maryland statute may mandate a death sentence under circumstances where the sentencing authority is not convinced that death is the appropriate punishment, it is claimed that the statute violates the Eighth and Fourteenth Amendments.

This Court has rejected arguments like that set forth above on several occasions. *See, e.g., State v. Tichnell, supra*, 306 Md. at 467-468, 509 A.2d 1179; *Booth v. State, supra*, 306 Md. at 224, 507 A.2d 1098; *Huffington v. State*, 304 Md. 559, 587, 500 A.2d 272 (1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 3315, 92 L.Ed.2d 745 (1986); *Foster v. State, supra*, 304 Md. at 473-475, 499 A.2d 1236; *Calhoun v. State, supra*, 297 Md. at 637, 468 A.2d 45; *Tichnell v. State*, 287 Md. 695, 728, 415 A.2d 830 (1980). We have held that the Maryland capital punishment statute does not require the death sentence if the jury believes death to be inappropriate and that it is not a mandatory death penalty statute. As explained in the *Foster* case (304 Md. at 474-475, 499 A.2d 1236),

> "§ 413(g)(8) includes as mitigating circumstances '[a]ny other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case.' We held in *Tichnell I* that, because of this provision, the Maryland statute 'is not a mandatory death penalty statute,' and

> satisfies the standards of *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), and *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). 287 Md. at 728, 415 A.2d 830. We reiterated this holding in *Calhoun*, pointing out that under the Maryland statute 'the sentencing authority may articulate *any factor* it finds in mitigation.' 297 Md. at 637, 468 A.2d 45.
>
> "Therefore, the defendant erroneously argues that "if the defendant fails to meet his burden of proof and persuasion' concerning mitigating circumstances, death 'may be mandated where the sentencer is unconvinced that death is the appropriate punishment.' . . . A sentencing authority, unconvinced that death is appropriate, may list as a mitigating circumstance whatever factor or factors may have led to this conclusion, irrespective of what the defendant produced or argued. If the sentencing authority perceives anything relating to the defendant or the crime which causes it to believe that death may not be appropriate, it may treat such factor as a mitigating circumstance and decide that it outweighs the aggravating circumstances."

The defendant Mills responds by indicating that the above-quoted holding may be accurate if all twelve jurors can agree upon the same mitigating factor and can agree that it outweighs the aggravating factor. (Reply brief, p. 16). Mills asserts, however, that "[t]he defense adduced evidence of a number of such [mitigating] factors, and individual jurors may well have been persuaded of their existence. Again, any number of jurors may have concluded . . . that the mitigating factors outweighed the aggravating. . . . Nevertheless, the mechanical operation of the statutory scheme permitted no choice—the jurors were required to return a death sentence whether they believed it justified . . . or not." (*Ibid.*).

Under the defendant's construction of the statute, unless all twelve jurors can agree that some mitigating factor or factors exist, and further, unless all twelve jurors can agree on the existence of the *same* mitigating factor or factors, the jury must conclude that there are no mitigating factors and that, if an aggravating circumstance has been found, the sentence must be death. Additionally, according to the defendant, all twelve jurors must agree that the same mitigating factor or factors outweigh the aggravating circumstances in order for the penalty to be other than death.[4] For example, under Mills' view, in a hypothetical case six jurors might believe that the accused was of "youthful age," that this factor outweighed the aggravating circumstances found, but that there were no other mitigating factors. Six other jurors might disagree concerning youthful age but might believe that the accused suffered from an unfortunate childhood, that this was a mitigating factor, and that it outweighed the aggravating factors. Yet because it could not *unanimously* mark "yes" to any one mitigating circumstance, according to Mills's theory the jury would be required to find that no mitigating circumstance existed and therefore, would be required to return a sentence of death.

Like other challenges to the validity of the Maryland death penalty statute that have been made,[5] the defendant's argument is premised upon an erroneous construction of the statute.

Nothing in the pertinent language of the death penalty statute purports to abolish the traditional common law and Maryland requirement that, absent waiver, jury determinations of critical issues must be unanimous. This requirement of unanimity generally extends to all matters

[4] While raised in the briefs, this contention by the defendant was developed more extensively during oral argument before this Court.

[5] *See, e.g., Foster v. State, supra*, 304 Md. at 471-480, 499 A.2d 1236.

submitted to the jury; it applies to the entire jury determination. As stated by this Court long ago, a " 'verdict is the *unanimous* decision made by the jury . . . on the matters lawfully submitted to [it] in the course of the trial.' *Unanimity* is indispensable to the sufficiency of the verdict. . . ." *Ford v. The State*, 12 Md. 514, 549 (1859) (emphasis in original).[6] The Maryland death penalty statute refers to "the jury" as a single entity, making its findings and determinations concerning the presence or absence of aggravating circumstances, the existence of mitigating circumstances, and the weighing of one set against the other. Art. 27, § 413, subsections (d), (f), (g) and (h).[7] The jury is required to set forth its deci-

[6] *See, generally, e.g.*, Article 5 and 21 of the Maryland Declaration of Rights; *Smith v. State*, 299 Md. 158, 163-166, 472 A.2d 988 (1984); *State v. McKay*, 280 Md. 558, 561-562, 566-574, 375 A.2d 228 (1977); *Coby v. State*, 225 Md. 293, 297-299, 170 A.2d 199 (1961); 2 Poe, *Pleading and Practice* § 333 (1925 ed.).

[7] These provisions, in relevant part, are as follows:

"(d) *Consideration of aggravating circumstances.*—In determining the sentence, the court or jury, as the case may be, shall first consider whether, beyond a reasonable doubt, any of the following aggravating circumstances exist:

* * * * * *

"(f) *Finding that no aggravating circumstances exist.*—If the court or jury does not find, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall state that conclusion in writing, and the sentence shall be imprisonment for life.

"(g) *Consideraiton of mitigating circumstances.*—If the court or jury finds, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall then consider whether, based upon a preponderance of the evidence, any of the following mitigating circumstances exist:

* * * * * *

"(h) *Weighing mitigating and aggravating circumstances.*—(1) If the court or jury finds that one or more of these mitigating circumstances exist, it shall determine whether, by a pre-

sions on these matters on a form which, while relating to the sentence, is essentially a verdict sheet.[8] The death penalty statute expressly reflects the traditional requirement of unanimity, as it provides in § 413(i) as follows (emphasis added):

> "(i) *Determination to be written and unanimous.* —The determination of the court or jury shall be in writing, and, if a jury, *shall be unanimous* and shall be signed by the foreman."

See Harris v. State, 295 Md. 329, 339-340, 455 A.2d 979 (1983).

Consequently, the defendant Mills correctly argues that for the jury *to determine* that the sentence is to be *life* imprisonment, the decision that there are mitigating circumstances not outweighed by aggravating circumstances must be arrived at unanimously. Because of the same statutory requirement of unanimity, however, for the jury *to determine* that the sentence is to be *death*, the decision that there exists at least one aggravating circumstance which outweighs whatever mitigating circumstances may exist must also be arrived at unanimously. There is utterly no basis in the statutory language or in logic for Mills's conclusion that whenever the jurors cannot unanimously agree on the same mitigating circumstance or circumstances, the result will always be a sentence of death. As long as one juror believes that there exists a mitigating factor, and that this factor is not outweighed by the aggravating circumstances, and if such juror continues to adhere to his or her position, the sentence will not be

---

ponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances.

"(2) If it finds that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death.

"(3) If it finds that the mitigating circumstances outweigh the aggravating circumstances, the sentence shall be imprisonment for life."

[8] *See* former Rule 772A, which governed the instant capital sentencing proceeding.

death under the statutory scheme. It is true that, if there is ultimate disagreement among the jurors, there may be no *jury* determination of a life sentence. In this situation, however, there will also be no jury determination of a death sentence. Instead, the sentence will be life imprisonment under Art. 27, § 413(k)(2), which states:

> "(2) If the jury, within a reasonable time, is not able to agree as to sentence, the court shall dismiss the jury and impose a sentence of imprisonment for life."

Thus, in the hypothetical case described earlier, where six jurors found the existence of the statutory mitigating factor of youthful age and believed that it was not outweighed by aggravating circumstances, but found no other mitigating factors, while the other six jurors refused to find the existence of youthful age but found the existence of a different mitigating factor, the jury as a single entity would not be able to indicate on the sentencing form that any particular mitigating factor existed because of the lack of unanimity among jurors. But, contrary to the defendant's argument, the same lack of unanimity would preclude the jury from indicating that no mitigating factors were present. And, as long as at least one of the jurors adhered to the view that there was a mitigating circumstance not outweighed by the aggravating circumstances, the sentence would ultimately be life imprisonment. Even if the other eleven jurors became convinced that there were not mitigating factors, it would nevertheless be improper for the jury to decide that no mitigating factors exist and that the sentence should be death. This would be "majority rule," contrary to the traditional Maryland requirement of jury unanimity which is expressly embodied in § 413(i) of the Maryland death penalty statute.

To reiterate, as long as one juror perceives any factor relating to the crime or the defendant which he regards as a mitigating factor and which he believes is not outweighed by the aggravating circumstances, the jury will

not be able to determine that the sentence shall be death. Moreover, as pointed out repeatedly in our cases, if a juror does not believe that death is the appropriate punishment, whatever factor relating to the crime or the defendent that led to such belief may be regarded by that juror as a mitigating circumstance not outweighed by aggravating circumstances. Assuming that such juror does not change his mind after jury deliberations for a reasonable time, the sentence in the case will be life imprisonment under § 413(k)(2).

While no issue has been raised by the defendant Mills concerning the sentencing form or the jury instructions in this regard, it is noteworthy that both the form and the instructions were entirely in accord with the requirement that the critical jury determinations be reached by the unanimous vote of the jurors. The sentencing form, with the jury's answers, was in part as follows (emphasis added):

> "Based upon the evidence we unanimously find that each of the following aggravating circumstances which is marked 'yes' has been proven BEYOND A REASONABLE DOUBT and each aggravating circumstance which is marked 'no' has not been proven BEYOND A REASONABLE DOUBT:
>
> "1. The victim was a law enforcement officer who was murdered while in the performance of his duties.
>
> | | X |
> |---|---|
> | yes | no |
>
> "2. The defendant committed the murder at a time when he was confined in a correctional institution.
>
> | | X |
> |---|---|
> | yes | no |

* * *

> "10. The Defendant committed the murder while committing or attempting to commit robbery, arson or rape or sexual offense in the first degree.
>
> | | X |
> |---|---|
> | yes | no |
>
> "(If one or more of the above are marked 'yes', complete Section II. If all of the above are marked 'no', do not complete Sections II and III.)
>
> "SECTION II
>
> "Based upon the evidence *we unanimously find that* each of the following mitigating circumstances which is marked 'yes' has been proven to exist by A PREPONDERANCE OF THE EVIDENCE and *each mitigating circumstance marked 'no' has not been proven by* A PREPONDERANCE OF THE EVIDENCE:
>
> "1. The defendant previously (i) has not been found guilty of a crime of violence; and (ii) has not entered a plea of guilty or nolo contendere to a charge of a crime of violence; and (iii) has not been granted probation on stay or entry of judgment pursuant to a charge or a crime of violence. As used in this paragraph, 'crime of violence' means abduction, arson, escape, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery, or rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.
>
> | | X |
> |---|---|
> | yes | no |
>
> "2. The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.
>
> | | X |
> |---|---|
> | yes | no |

"3. The defendant acted under substantial duress, domination or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution.

	X
yes	no

"4. The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder or emotional disturbance.

	X
yes	no

"5. The youthful age of the defendant at the time of the crime.

	X
yes	no

"6. The act of the defendant was not the sole proximate cause of the victim's death.

	X
yes	no

"7. It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

	X
yes	no

"8. Other mitigating circumstances exist, as set forth below:

None

* * *

"We *unanimously* determine the sentence to be Death.

[Signatures of all twelve jurors]"

It is clear that the form required the jurors to agree unanimously that there were no mitigating factors in order for the jury to mark "no" with respect to all statutory or other possible mitigating factors. Despite the suggestion to the contrary in the dissenting opinion, there is no ambiguity in the language of Section II concerning unanimity. The words are: "we unanimously find that each of the following mitigating circumstances which is marked 'yes' has been proven to exist . . . and each mitigating circumstance marked 'no' has not been proven. . . ." In addition to the clause referring to each mitigating circumstance marked "yes," the clause referring to each mitigating circumstance marked "no" is also the object of "we unanimously find that." The sentencing form or "verdict sheet," as completed in this case, demonstrates that not a single juror found the existence of any mitigating circumstance.

The trial judge's instructions in the present case similarly emphasized that jury determinations must be unanimous. After the court clerk handed the jurors copies of the sentencing form, the trial judge instructed the panel as follows: "Let me remind you that in reaching your determination as to any of the issues raised by the case and presented to you on this sentencing form your verdict must be unanimous; that is, all twelve of you must agree." When the trial judge explained mitigating circumstances to the jury, he said: "Again I stress that your finding as to mitigating circumstances must be unanimous, that is you must all agree." At the end of his instructions the judge said: "Again let me remind you of . . . the requirement that your verdict or your decision with regard to any of these items must be unanimous." After closing arguments, just before the jury retired to deliberate, the judge added: "Let me remind you that . . . as you consider each of the circumstances you must indicate *yes or no*, however your *unanimous* decision falls. You must indicate yes or no as to each of those circumstances." (Emphasis added). The jury was

fully instructed that it must be unanimous in finding that no mitigating circumstances existed. In light of the verdict sheet and the trial judge's instructions, there is no basis for Mills's speculation that some of the jurors might have believed that some mitigating factors existed.

Finally, we are aware of no Maryland authority which would support the apparent view of the defendant and of Judge McAuliffe that, if jurors are unable to agree unanimously in favor of one party or one side of an issue submitted, but remain in disagreement, the result is somehow a verdict or determination in favor of the other party or the other side of the issue. Judge McAuliffe suggests in his dissenting opinion that when a jury is asked if a particular circumstance exists or has been proven, unanimity is required for the jury to answer the question in the affirmative but not in the negative. The dissent states that "[i]f one juror believes it has been so proven, but eleven do not the jury answers 'no' to the question. . . ." This is not, however, how the jury system and the burden of proof traditionally function.

For example, in many ordinary tort cases, the only disputed issue is whether the plaintiff has met the burden of proving that the defendant was negligent. The ultimate question regarding liability presented to the jury is: "has it been proven that the defendant was negligent?" If all twelve jurors agree that the plaintiff has proven negligence, there will be a verdict for the plaintiff. If all twelve jurors believe that the plaintiff has failed to prove negligence, there will be a verdict for the defendant. But, any other alignment will result in a hung jury. Thus, if one juror believes that the plaintiff has proven that the defendant was negligent, and if eleven jurors believe that the plaintiff has failed to prove negligence, the result is not a verdict for the defendant. In this situation, the jury is unable to answer the question "was the defendant negligent?" The fact that the plaintiff has the burden of proof does not result in some

form of majority or plurality rule. Rather, the burden of proof operates with respect to each juror individually.

The same is true in a criminal case. As previously pointed out, the jurors must be unanimous one way or the other on all issues submitted, *Ford v. The State*, *supra*, 12 Md. at 549. If one juror believes that the State has met its burden of proving the defendant's guilt, but the other eleven jurors are not convinced beyond a reasonable doubt of guilt, the result is not an acquittal but a hung jury. Otherwise, there would be no need for modified *Allen*-type instructions to jurors who are unable to reach unanimous agreement. *See, e.g., Mayfield v. State*, 302 Md. 624, 490 A.2d 687 (1985); *Goodmuth v. State*, 302 Md. 613, 490 A.2d 682 (1985); *Burnette v. State*, 280 Md. 88, 371 A.2d 663 (1977); *Kelly v. State*, 270 Md. 139, 310 A.2d 538 (1973).

The dissenting opinion, at another point, seems to agree that the jury's "determination of any *ultimate issue* essential to the verdict must be unanimous." The dissent goes on to state, however, that "where alternative findings of historic facts are advanced in support of a single conclusion the better rule is that the jurors need not agree on any single alternative fact provided they all agree on some alternative fact that leads them to a single conclusion on the ultimate issue." We shall assume that this is the "better rule" with regard to alternate findings of historical facts in support of a single conclusion. Nevertheless, the presence *or absence* of aggravating and mitigating circumstances, and the weighing of aggravating against mitigating circumstances, all fall into the category of "ultimate issues." The General Assembly by statute has made them the critical issues to be submitted to and determined by the capital sentencing jury. Not only are they "ultimate issues essential to the verdict," but, under the statute and rule, the jury's determinations of the presence or absence of aggravating and mitigating circumstances constitute part of the "verdict" itself. As such, unanimity is contemplated under Maryland law.

Art. 27, § 413(i); *Smith v. State*, 299 Md. 158, 163-166, 472 A.2d 988 (1984); *Ford v. The State*, *supra*, 12 Md. at 549.

The defendant Mills's contention, concerning the effect of juror disagreement on an issue, is also contrary to the position taken generally throughout the country. The cases regularly point out that unanimity is required for a jury determination on either side of an issue, that the burden and standard of proof operate upon each juror individually and not upon the jury collectively on a majority basis, and that the failure to achieve unanimity on either side of an issue ordinarily results in a hung jury. *See generally, e.g., Bolt v. State*, 29 Ala.App. 152, 193 So. 560 (1940); *Brown v. State*, 369 A.2d 682, 684 (Del. 1976); *Castle v. The State*, 75 Ind. 146 (1881); *Stitz v. The State*, 104 Ind. 359, 362-263, 4 N.E. 145 (1885); *Garden v. Moore*, 174 Iowa 376, 156 N.W. 410, 411 (1916); *The State v. Stewart*, 52 Iowa 284, 286-287, 3 N.W. 99 (1879); *Easter v. State*, 191 Miss. 651, 4 So.2d 227, 137 A.L.R. 391 (1941); *Commonwealth v. Witt*, 93 Pa.Super., 446, 448-449 (1928); *State v. Harris*, 89 R.I. 202, 206-207, 152 A.2d 106 (1959); *Casstevens v. Texas & P. Ry. Co.*, 119 Tex. 456, 32 S.W.2d 637, 638 (1930); *State v. Wisman*, 94 W.Va. 224, 118 S.E. 139, 141 (1923); *State v. McCausland*, 82 W.Va. 525, 96 S.E. 938, 941 (1918); Anno., *Reasonable Doubt of Individual Juror*, 137 A.L.R. 394 (1942); 1 *Underhill's Criminal Evidence*, § 30 (6th ed.); 1 *Wharton's Criminal Evidence* § 11 (13th ed.).

This principle of unanimity has specifically been applied to jury determinations of the penalty in capital cases. Thus, in *Andres v. United States*, 333 U.S. 740, 746-749, 68 S.Ct. 880, 92 L.Ed. 1055 (1948), a statute provided that the jury in a murder case could qualify its verdict by adding "without capital punishment," that if the jury so qualified its verdict the punishment would be life imprisonment, but that "[i]f a qualified verdict is not returned, the death penalty is mandatory." 333

U.S. at 746, 68 S.Ct. at 883. The government's argument, somewhat like the defendant's argument in the instant case, was that the jurors were required to be unanimous in order for the jury to add the qualification but that unanimity was not required to reject the qualification. In the government's view, if the jurors remained in disagreement, there would be no qualification, and the sentence would be death. The Ninth Circuit rejected the government's argument, holding "that unanimity of the jury was required both as to guilt and the refusal to qualify the verdict by the words 'without capital punishment.'" *Id.* at 746-747, 68 S.Ct. at 883. The Supreme Court in *Andres* agreed with the Ninth Circuit and disagreed with the government, stating as follows (*id.* at 748-749, 68 S.Ct. at 804):

> "Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. In criminal cases this requirement of unanimity extends to all issues—character or degree of the crime, guilt and punishment—which are left to the jury . . . . [W]e conclude that the construction placed upon the statute by the lower court is correct—that the jury's decision upon both guilt and whether the punishment of death should be imposed must be unanimous. This construction is more consonant with the general humanitarian purpose of the statute and the history of the Anglo-American jury system than that presented by the Government."

Numerous cases are in accord with the position taken in *Andres* concerning the jury's finding of mitigation or determination of the penalty in a capital case. *See, e.g., Smith v. United States*, 47 F.2d 518, 519-520 (9th Cir. 1931); *People v. Green*, 47 Cal.2d 209, 302 P.2d 307, 315-322 (1956); *People v. Hall*, 199 Cal. 451, 249 P. 859 (1926); *State v. Reynolds*, 41 N.J. 163, 187, 195 A.2d 449 (1963); *People v. Hicks*, 287 N.Y. 165, 170-171, 174, 38 N.E.2d 482 (1941). *See also, Davis v. State*, 51 Okla.

Cr. 386, 389-390, 393-397; 1 P.2d 824, 2 P.2d 965 (1931); Anno., *Unanimity As To Punishment in Criminal Case Where Jury Can Recommend Lesser Penalty*, 1 A.L.R.3d 1461 (1965). *Contra: Commonwealth v. Stewart*, 359 Mass. 671, 270 N.E.2d 811, 814-815 (1971), *vacated*, 408 U.S. 845, 92 S.Ct. 2845, 33 L.Ed.2d 744 (1972).[9]

Consequently, we reject the defendant's argument that whenever the jurors cannot unanimously agree on the same mitigating circumstance or circumstances, they must return a death sentence.

B.

The foregoing discussion disposes of the defendant's contention that the Maryland death penalty statute, as applied to the facts of this case, is unconstitutionally mandatory.[10] Nevertheless, considering the defendant's misconstruction of the statute and the views expressed

---

[9] With regard to the requirement of unanimity in cases under recent death penalty statutes, *see Whalen v. State*, 492 A.2d 552, 562 (Del. 1985); *State v. Loyd*, 459 So.2d 498, 503 (La. 1984); *State v. Williams*, 23 Ohio St.3d 16, 490 N.E.2d 906, 913 (1986); *State v. Jenkins*, 15 Ohio St.3d 164, 473 N.E.2d 264, 306-307 (1984); *Evans v. Commonwealth*, 228 Va. 468, 323 S.E.2d 114, 121 (1984), *cert. denied*, 471 U.S. 1025, 105 S.Ct. 2037, 85 L.Ed.2d 319 (1985); *State v. Mak*, 105 Wash.2d 692, 718 P.2d 407, 442, 445, *cert. denied*, —— U.S. ——, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986).

The only case of which we are aware supporting the defendant Mills's argument under a recent death penalty statute (although not supporting his view as to constitutionality) is *State v. Kirkley*, 308 N.C. 196, 302 S.E.2d 144, 156-157 (1983). The North Carolina court cited no authority in support of its conclusion.

[10] The defendant also asserts that the Maryland death penalty statute is unconstitutional with regard to the allocation of the burden of proof. The identical argument has repeatedly been rejected by this Court. *See Foster, Evans and Huffington v. State*, 305 Md. 306, 503 A.2d 1326, *cert. denied*, —— U.S. ——, 106 S.Ct. 3310, 3315, 92 L.Ed.2d 722, 723, 745 (1986); *Foster v. State, supra*, 304 Md. at 471-480, 499 A.2d 1236, and cases there cited.

in the dissenting opinion, we believe that it would be useful for future guidance to comment generally upon the required jury determinations under Art. 27, § 413(d), (f), (g), and (h) in light of the traditional requirement of unanimity which is expressly embodied in § 413 (i).

In the usual criminal trial, of course, involving the issue of whether the defendant committed the offense charged, the result of a hung jury is ordinarily a mistrial and, at the state's option, a new trial on the issue. It is clear from Art. 27, § 413(k)(2), however, that the General Assembly did not intend for juror disagreement in a capital sentencing proceeding to result in a mistrial and a new sentencing proceeding. As previously pointed out, § 413(k)(2) provides for dismissal of the jury and a court-imposed life sentence "[if] the jury, within a reasonable time, is not able to agree as to sentence."

One difficulty in applying § 413(k)(2) is that the General Assembly has required more of the jury than the single determination of what the sentence should be. Under § 413(d), (f), (g), and (h), the jury must make decisions concerning the existence or non-existence of aggravating circumstances, the existence or non-existence of mitigating circumstances, and the weighing of aggravating against mitigating circumstances. Moreover, analytically (if not always practically) these decisions are to be made in sequential stages. The matter which the statute does not fully address is what happens where the jurors are unable to achieve entirely the contemplated unanimity and there is juror disagreement at different stages and with respect to different types of issues.

Section 413(d) first requires the jury to determine whether or not any of ten statutorily specified aggravating circumstances exist. Section 413(f) states that if the jury "does not find, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall state that conclusion in writing, and the sentence shall

be imprisonment for life." Section 413(g) then provides that if the "jury finds beyond a reasonable doubt, that one or more of these aggravating circumstances exist," the jury must go on to a consideration of mitigating circumstances. Under these provisions, a finding that at least one aggravating circumstance exists is clearly a precondition for the jury to consider mitigation, weighing and the possibility of a death sentence.

Consequently, absent a finding of an aggravating factor, a life sentence is to be imposed at the conclusion of the proceedings under subsection (d) and (f). If the jurors unanimously find the absence of any statutory aggravating circumstance, the jury under subsection (f) completes the verdict sheet accordingly and a life sentence is imposed. If the jurors are in disagreement and, after a reasonable period of time, unable to determine unanimously (as required by § 413(i)) that at least one aggravating circumstance is present, § 413(k)(2) comes into operation, the jury is dismissed, and the court imposes a life sentence.

The situation may also arise in connection with aggravating circumstances where the jurors unanimously agree that one or more aggravating circumstances exist, unanimously agree that several aggravating circumstances do not exist, but, after a reasonable time, remain in disagreement over the existence of one or more other possible aggravating circumstances listed in the statute. It is obvious that § 413(k)(2) does not operate in this situation to terminate the proceeding, because § 413(g) makes it clear that, upon a finding of only one statutory aggravating circumstance, the jury is to proceed and consider possible mitigating circumstances. Thus, in the hypothetical situation posed, the jury should mark "yes" on the form or verdict sheet as to the aggravating circumstance or circumstances which it finds present, should mark "no" as to the aggravating circumstance or circumstances which it finds absent, should not give any answer as to

presence or absence of the aggravating circumstance or circumstances over which it remains in disagreement, and should proceed to consider the presence or absence of mitigating circumstances under § 413(g).

Turning to the consideration of mitigating circumstances, § 413(g) requires the jury to decide "whether . . . any of the following [eight statutorily specified] mitigating circumstances exist." The eighth one is any fact which the jury believes is mitigating. Therefore, as discussed in Part A above, under the statute and implementing form prescribed by former Rule 772A, the jurors are expected to reach a unanimous decision concerning the presence or absence of each mitigating circumstance, as the jurors in the instant case did. The statute then provides in § 413(h) that "[i]f the court or jury finds that one or more of these mitigating circumstances exist, it" shall weigh the mitigating circumstances against the aggravating, determine which outweighs the other, and enter a sentence of life imprisonment or death depending on which outweighs the other.

The express language of the statute in § 413(g) and (h), however, contains substantial gaps. There is no provision, comparable to § 413(f) (regarding the absence of aggravating circumstances), telling the court or jury what to do if it finds no mitigating circumstances. Furthermore, there is no provision specifying what happens if the jurors are divided over some mitigating circumstances and thus cannot reach a complete determination. The language of § 413(g) and (h) deals only with the situation where the court or jury determines that one or more mitigating circumstances exist.

Nevertheless, the General Assembly obviously did not intend that the sentencing proceedings should end in a stalemate and that § 413(k)(2) should be invoked if the jury failed to find any mitigating circumstance. This would result in a life sentence for a defendant where there is no finding of mitigation. In contrast, § 413(h)

would require a death sentence for the defendant where there is a finding of mitigating circumstances but they are deemed outweighed by aggravating circumstances. Such construction of the statute would be entirely unreasonable.

The General Assembly, however, did provide that procedural gaps in the statute could be filled by the Court of Appeals. Section 413(*l*) states:

> "The Court of Appeals may adopt rules of procedure to govern the conduct of a sentencing proceeding conducted pursuant to this section, including any forms to be used by the court or jury in making its written findings and determinations of sentence."

Pursuant to subsection (*l*), this Court in former Rule 772A provided for the situation where the court or jury determined that no mitigating circumstance existed. The sentencing form specifies that, where there is a determination of no mitigating circumstances, the sentence is to be death. This is logical and in accord with the General Assembly's purpose that mitigating and aggravating circumstances be weighed. If there are no mitigating circumstances, there is nothing to weigh against the aggravating factors; one side of the scale is zero. Consequently, a death sentence is appropriate under the statutory scheme.

The sentencing form under former Rule 772A does not, however, deal with the situation where there is no jury agreement on the existence of any particular mitigating circumstance but where there also is no unanimous jury determination that no mitigating circumstance existed. This situation could take a variety of forms. For example, all of the jurors might agree that several very weighty mitigating circumstances are present, but there may be no unanimity concerning the existence of any one particular mitigating circumstance. At the other extreme, eleven jurors might believe that no mitigating circumstance exists, but one juror might insist that one mitigating circumstance exists although it is outweighed by the aggravating circumstances. It would not be consistent with the legislative scheme for the sentencing proceeding to be aborted under § 413(k)(2) in this situation.

In our view, where the jurors after a reasonable period of time cannot argee on any particular mitigating circumstance or circumstances, but also cannot agree that no mitigating circumstances exist, the jurors should proceed to the weighing process under § 413(h). Each juror should weigh the mitigating circumstance which he or she finds, if any, against the aggravating circumstances which the jury under § 413(d) has unanimously found to exist. In this manner, a jury might well arrive at a unanimous determination on the sentence even though there was underlying disagreement on the presence or absence of some mitigating circumstances. This process comports with the general legislative intent that the imposition of the penalty in these cases should depend upon the weighing of mitigating and aggravating circumstances.

In sum, with regard to mitigating circumstances, the jury should mark the sentencing form "yes" for each mitigating circumstance which is unanimously found to exist, mark the form "no" for each mitigating circumstance which is unanimously found not to exist, and leave the form blank with regard to those mitigating circumstances (if any) as to which there is disagreement. Then, unless there is unanimity that no mitigating circumstance exists (such as in the instant case), the jurors should engage in the weighing process.

VII.

Mills next argues that the trial court erred in failing to instruct the jury that it must find that he was a principal in the first degree in order for the death pen-

alty to be a possible sentence. Preliminarily, we note that Mills made no request for such instruction, and made no objection to the trial court's failure to give the instruction *sua sponte*.

Furthermore, under the facts of this case, the absence of the instruction could not have prejudiced Mills. There could be no doubt concerning the defendant's status as a principal in the first degree. Mills and the victim were isolated in a locked jail cell. Mills emerged with a bloody "shank" in his gloved hand and confessed to killing his cell mate, as previously described. He concedes in his brief "the absence of any factual dispute raised by the evidence" regarding the matter. (Brief, p. 53). Accordingly, the omission in the trial court's instructions, even if error, was clearly harmless.

VIII.

Mills makes two additional complaints concerning the sentencing hearing. Neither matter, however, was preserved for appellate review. Rules 4-322, 4-325(e) and 885.

First, the defendant claims that the trial court's instruction to the jury on the possible mitigating circumstance of the youthful age of the defendant provided insufficient "guidance" and was "oversimplified." (Brief, pp. 53-54). We need not explore this question, as Mills never requested an instruction on the mitigating circumstance of youthful age, did not object to the instruction given, and defense counsel expressly stated at the conclusion of the trial judge's jury instructions: "The defense has no objection to the instructions given to the jury, your honor."

Second, the defendant asserts that the jury was permitted to hear "a great deal of inadmissible and highly prejudicial evidence." (Brief, p. 56). Not only was there no defense objection to this evidence, but some of the evi-

dence complained of was apparently introduced by the defense. The defendant on appeal obviously cannot challenge the admissibility of this evidence.[11]

IX.

The defendant contends that the death sentence in this case is excessive and disproportionate to the penalty imposed in similar cases.[12] Mills cites six allegedly "similar cases" from the circuit courts involving homicides in correctional institutions.[13] In all six cases, the defendants either were convicted of first degree murder and received life sentences or were convicted of second degree murder and received a term of years. The defendant Mills asserts that his "research has disclosed *no* cases in which murder perpetrated by an inmate has resulted in a death sentence." (Brief, p. 63).

Preliminarily, we note that because no person has previously been sentenced to death for a particular type of murder, under a recently enacted death penalty statute, does not mean that the first death sentence for that type of murder is necessarily disproportionate or excessive. Otherwise, no one would ever receive the ultimate penalty under a capital punishment statute requiring

---

[11] To the extent that trial counsel's tactics in deciding to present certain evidence may relate to the constitutional adequacy of counsel, the matter is not appropriate for resolution on direct appeal. It can be raised in a post conviction proceeding. *Harris v. State*, 299 Md. 511, 517-519, 474 A.2d 890 (1984), and cases there discussed.

[12] Art. 27, § 414(e)(4) requires that this Court determine "(4) [w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

[13] They are *State v. Parker*, No. 26,113, Circuit Court for Anne Arundel County; *State v. Holt*, No. 5215, Circuit Court for Washington County; *State v. Appleby*, No. 18429601, Circuit Court for Baltimore City; *State v. Ellison and Little*, Nos. 18403101 and 18403103, Circuit Court for Baltimore City; *State v. Gee*, No. 18321508, Circuit Court for Baltimore City; *State v. Mack*, No. 5737, Circuit Court for Washington County.

proportionality review. For a detailed discussion of proportionality review under the present Maryland capital punishment statute, as well as under similar statutes in other states, *see Tichnell v. State*, 297 Md. 432, 457-473, 468 A.2d 1 (1983), *cert. denied*, 466 U.S. 993, 104 S.Ct. 2374, 80 L.Ed.2d 846 (1984).

We have examined the six cases relied upon by the defendant Mills, and we conclude that the death sentence in the present case is not disproportionate or excessive in light of the sentences imposed in those cases. In only one of those cases was there a capital sentencing proceeding (*State v. Parker*), and there the sentencing authority found as a mitigating factor that the defendant had a significant mental impairment. In the other cited cases there were factors or circumstances distinguishing them from the instant case. For example, in one case there was evidence that the defendant had been physically and verbally abused by the victim and in another cited case the jury could not determine whether the accused were principals in the first degree.

The record before us shows that Mills brutally stabbed his cell mate to death. There was neither evidence of provocation nor of a struggle; there was express evidence of long premeditation. Mills fingerpainted a slogan with the victim's blood, and he acknowledged the deed as soon as it was discovered. The jurors unanimously found no mitigating factors, and our review of the record confirms that the jury's action was warranted. Mills was serving a sentence for second degree murder at the time of this offense.

Considering the crime and the defendant, and comparing the penalty in this case to the death sentences imposed in cases such as *Booth v. State*, *supra*, 306 Md. 172, 507 A.2d 1098; *Foster v. State*, *supra*, 304 Md. 439, 499 A.2d 1236; and *Colvin v. State*, 299 Md. 88, 472 A.2d 953, *cert. denied*, 469 U.S. 873, 105 S.Ct. 226, 83 L.Ed.2d 155 (1984), where the defendants also brutally

and without provocation stabbed their victims to death, we do not believe that the sentence here was disproportionate or excessive.

X.

Mills's final argument is that Art. 27, § 413(d)(2), specifying as an aggravating circumstance that "[t]he defendant committed the murder at a time when he was confined in any correctional institution," is unconstitutional. The gist of his contention is as follows (Brief, p. 66):

> "It is a fundamental constitutional requirement that 'an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.' *Zant v. Stephens*, 462 U.S. 862 [876-878, 103 S.Ct. 2733, 2742-43,] 77 L.Ed. 2d 235, 249-250 (1983). Applying the foregoing standard to § 413(d)(2) it is clear that this aggravating factor fails to meet the constitutional standard. Both of the traditional, presumably rational, concerns in dealing with prisoners—escape and deterring 'lifers'—are specifically provided for by other aggravating factors. Article 27, § 413(d)(3) & (8)."

In addition, Mills asserts that § 413(d)(2) is overly broad, covering some "individuals . . . no more culpable than members of society at large. . . ." (*Ibid.*).

In our view, the Maryland General Assembly was not constitutionally prohibited from listing as an aggravating circumstance the commission of a murder while an inmate in a correctional institution. This aggravating factor closely resembles one of the aggravating factors proposed by the Model Penal Code, and cited with approval in *Gregg v. Georgia*, 428 U.S. 153, 193-195 n. 44, 96 S.Ct. 2909, 2935 n. 4, 49 L.Ed.2d 859 (1976), namely

that "[t]he murder was committed by a convict under sentence of imprisonment." Moreover, it seems plain to us that this circumstance does genuinely narrow the class of persons eligible for the death penalty.

Finally, the General Assembly is entitled to treat inmate status as an aggravating factor to deter inmates from murdering each other and those who come in contact with them. As pointed out by the Supreme Court of Arizona in *State v. Gillies*, 135 Ariz. 500, 662 P.2d 1007, 1019 (1983), the "legislative intent of this . . . [aggravating factor] is to protect the guards and other inmates at such institutions where a defendant is confined and to discourage violence by incarcerated persons." We cannot conclude that this legislative purpose is irrational. Furthermore, this purpose is not entirely met by other aggravating factors such as § 413(d)(3) and (8), concerning those sentenced to life imprisonment or death and those who escape or attempt to escape, neither of which would have been applicable to Mills.

We reject, therefore, the defendant's assertion that § 413(d)(2) is unconstitutional.[14]

JUDGMENT AFFIRMED.

---

[14] In light of the Supreme Court's recent decision in *Booth v. Maryland*, —— U.S. ——, 107 S.Ct. 2529, 95 L.Ed.2d —— (1987), we note that in the instant case no "Victim Impact Statement" was introduced in evidence or even proffered. There was attached to the Division of Parole and Probation's investigation report a memorandum from Jane Christy of the victim/witness assistance program to the State's Attorney, summarizing an interview with the victim's brother and sister-in-law. This memorandum was admitted into evidence after Mills's counsel expressly informed the Court that he had read it and did not object to its admission. The memorandum stated in its entirety as follows:

> "Paul and Thomas Brown came from a family of six. At a very young age they were removed from their parents custody because of neglect and placed in separate foster homes. (Removal by the Department of Social Services was prompted by Paul being hospitalized at age 4 for anemia and malnutrition.) "Paul was a hyperactive child and hard to handle which resulted in a lot of beatings from his various guardians. He ran away constantly from the various homes in which he had been placed. After a while Paul, at the age of 15, just started living on the streets. He was eventually sent to the Maryland Training School for Boys. Paul never really had a home or a family as such. 'I (Thomas Brown) tried to keep in touch with Paul by writing and visiting him whenever possible. I always had good homes and a good life and always felt so guilty that there was nothing I could do to help Paul. After all, I was only one year older than he.'
>
> "'Paul was a good person who had a tough life, a lot of bad breaks, no family, no home, nobody to really give him a chance. I sometimes think he felt more secure in prison, because he had no one on the outside. Sure, he committed crimes, but he wasn't violent. He did what he had to do to survive and he got involved with a lot of bad people."

This memorandum did not purport to be and did not fall within the statutory requirements of a victim impact statement. *See* Code (1957, 1986 Repl.Vol.), Art. 41, § 4-609(c). The memorandum did not describe the impact of the crime on the victim's family or the "family members' opinion and characterizations" of the crime and the defendant. *Booth v. Maryland, supra.* As defense counsel recognized at the sentencing proceeding in this case, the content of this statement would not inflame a jury or otherwise prejudice Mills. Consequently, the memorandum did not constitute the "victim impact evidence" found constitutionally inadmissible in *Booth v. Maryland, supra.*

MURPHY, Chief Judge, concurring in the judgment:

I am in full agreement with the Court's affirmance of Mills' conviction for first degree murder. I also agree with the Court's judgment affirming the imposition of the death penalty, although I do not fully concur with the Court's construction of the statute and implementing rules, as set forth in Part VI of the opinion.

McAULIFFE, Judge, dissenting.

I concur in the decision to affirm the conviction. Because I am unable to agree with Part VI of the majority

opinion and because I believe the sentencing procedure employed in this case was constitutionally unfair to the Defendant, I dissent from the affirmance of the sentence of death.

At the threshold of my disagreement with the majority lies a question of statutory construction. The majority holds that the Legislature intended to make the *non-existence* (as well as the existence) of aggravating and mitigating circumstances an ultimate issue in a capital sentencing proceeding, and therefore intended to require a unanimous verdict of existence or non-existence. I believe the Legislature intended to require unanimity for a finding of the existence of a circumstance, but did not intend to mandate a unanimous finding that any individual circumstance does not exist. I further believe it is probable, or at least reasonably possible, that this jury understood the language as the Legislature intended it, and that the answers of "no" given on the sentencing form represented their failure to unanimously find the existence of a circumstance, rather than a unanimous determination that the circumstance did not exist. This is no mere semantic difference, for if I am correct, it means that the procedure followed in this case impermissibly and unconstitutionally precluded the ultimate consideration of mitigating factors that may have been proven.

Moreover, even if I were to accept the majority's interpretation of the statute, I would find it intellectually difficult to accept the rather extraordinary, and I think illogical, "filling of the gaps" accomplished by Section VI.B of the majority opinion. Finally, if this newest creative interpretation of our capital punishment statute is entirely correct there should nonetheless be a new sentencing proceeding in this case. It is clear to me that no one at the trial could have understood the law to be as it is announced today, and the trial judge's instructions were to the contrary. I turn to a more detailed examination of these several problems.

Our death penalty statute mandates that the jury "shall first consider whether, beyond a reasonable doubt, any of the [enumerated] aggravating circumstances exist." Maryland Code, Art. 27 § 413(d). Combining that with the requirement of unanimity which appears elsewhere in the statute, I interpret the question presented to the jury as to each enumerated aggravating circumstance to be:

> Do the jurors unanimously determine that this aggravating circumstance has been proven to exist beyond a reasonable doubt?

If one juror believes it has been so proven, but eleven do not the jury answers "no" to the question, and that particular aggravating factor cannot be considered in the ultimate weighing process. Every relevant section of the statute speaks to whether the jury finds that an aggravating circumstance *exists*—nothing therein suggests the jury must also be unanimous in determining that an aggravating circumstance *does not exist*. Consider the language of these sections:

> (d) [T]he court or jury, as the case may be, shall first consider whether, beyond a reasonable doubt, any of the following aggravating circumstances exist:
>
> • • • •
>
> (f) If the court or jury does not find, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall state that conclusion in writing, and the sentence shall be imprisonment for life.
>
> (g) If the court or jury finds, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall then consider whether, based upon a preponderance of the evidence, any of the following mitigating circumstances exist:
>
> • • • •

> (h) If the court or jury finds that one or more of these mitigating circumstances exist, it shall determine whether, by a preponderance of the evidence, mitigating circumstances outweigh the aggravating circumstances.[1]

Unfortunately, the form initially approved by this Court for use in capital sentence proceedings did not make clear that the requirement of unanimity with respect to consideration of an aggravating circumstance applied only to the question of whether that circumstance had been proven to exist. Rather, Maryland Rule 772A(d), effective January 1, 1979, approved the following language:

> Based upon the evidence we unanimously find that each of the following aggravating circumstances which is marked 'yes' has been proven BEYOND A REASONABLE DOUBT and each aggravating circumstance which is marked 'no' has not been proven BEYOND A REASONABLE DOUBT. . . .

Although this language can accommodate the interpretation I believe to be correct, it also can accommodate the interpretation placed upon it by the majority—that the jurors must be unanimous in their determination that the aggravating circumstance does not exist in order to answer "no." A change in this language was made by the adoption of Rule 4-343(c) which supplanted Rule 772A(d), and which became effective July 1, 1984. That section now reads:

> Based upon the evidence we unanimously find that each of the following aggravating circumstances that is marked 'yes' has been proven BEYOND A REASONABLE DOUBT. Each of the aggravating circumstances that has not been proven is marked 'no.'

[1] We have interpreted this language to mean that the jury shall determine whether, by a preponderance of the evidence, the *aggravating* circumstances outweigh the *mitigating* circumstances. *Foster v. State*, 304 Md. 439, 499 A.2d 1236 (1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 3310, 92 L.Ed.2d 723 (1986).

This change, intended to be one of style and not substance, more accurately reflects the intent of the Legislature. Unfortunately, the new language is not so clear in its meaning that it does not require explanation by means of careful instruction, and in any event the revised form was not used in this case.[2]

Had the sentencing form simply used the language of the statute by providing that "we unanimously find beyond a reasonable doubt that the following aggravating circumstances exist" and then listed the aggravating factors with a box to be checked as to each found to exist, I believe jurors would have had no difficulty in concluding they were to mark only those circumstances they unanimously found to have been proven to exist. They simply would not mark those about which they disagreed. Because the jurors are specifically instructed that they may consider only the aggravating factors they have unanimously found to exist, the defendant is fully protected. Thus, there is no need, much less any legislative mandate, for a jury to unanimously find that a particular aggravating circumstance does not exist before it may continue deliberation.

Not only is the legislative scheme for consideration and determination of aggravating circumstances adequate for the protection of an accused, it may well grant him more protection than is constitutionally required. The Supreme Court of Virginia has held, for example, that the requirement of unanimity extends to the ultimate question of

[2] The form actually used in this case tracked Rule 772A(d), rather than Rule 4-343(c). The latter rule was applicable and should have been followed, but that change alone would not have cured the deficiencies present in this sentencing procedure. I have reviewed other differences between the form actually used and that which should have been used, and I find no indication of possible prejudice to the Appellant.

whether death is the appropriate sanction and to the question of existence of any statutory enumerated aggravating factors that justify the imposition of the death penalty, but not to the existence of each individual aggravating circumstance. *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784, 791-92 (1979), *cert. denied*, 444 U.S. 1049, 100 S.Ct. 741, 62 L.Ed.2d 736 (1980). *See also Briley v. Bass*, 584 F.Supp. 807, 819 (E.D.Va.) (United States Constitution does not require that jury be unanimous as to aggravating factors relied upon in imposing death penalty), *cert. denied*, 469 U.S. 893, 105 S.Ct. 270, 83 L.Ed.2d 206 (1984); *Blake v. State*, 239 Ga. 292, 236 S.E.2d 637 (jury conclusion that sufficient aggravating circumstances exist cannot be impeached by showing that part of the jury proceeded upon one interpretation and part upon another), *cert. denied*, 434 U.S. 960, 98 S.Ct. 492, 54 L.Ed.2d 320 (1977).

In *State v. Kirkley*, 308 N.C. 196, 302 S.E.2d 144 (1983), the Supreme Court of North Carolina considered and rejected a defendant's claim that the requirement of unanimity extended not only to the existence of aggravating and mitigating circumstances, but to their nonexistence as well. That Court said, *id.* 302 S.E.2d at 157:

> Defendant contends, however, that even if it is proper that a mitigating circumstance exist only when there is unanimous agreement by the jury, the trial judge erred when he instructed the jurors that a mitigating circumstance must be deemed not to exist in the absence of a unanimous agreement on its existence. Defendant urges this Court to impose the following requirement: that in order for a jury to find that a mitigating factor does not exist it must first unanimously agree it does not exist. If no unanimous agreement is reached, defendant contends, the result is a hung jury and the automatic imposition of life imprisonment. Although novel, the suggested approach is unworkable and contrary to the general principles of unanimity.
>
> * * * *
>
> The unanimity requirement is only placed upon the finding of whether an aggravating or mitigating circumstance exists.

The mandate of our statute that the jury specifically and in writing determine "[w]hich, if any, aggravating circumstances it finds to exist" obviates consideration of the above approach and the thorny subject of unanimity as it relates to the existence of aggravating circumstances. With this language the Legislature has made it clear that there must be unanimity as to each individual aggravating circumstance before it can be considered. Still, I shall return to the question of unanimity and a consideration of the levels at which it must be applied in the adjudicative process, when I turn to analysis of the proper function of the jury with respect to the consideration of mitigating circumstances.

Under Appellant's interpretation of the statute, with which I agree, a split of six-six on whether an aggravating or a mitigating circubstance has been proven to exist simply means that the answer of the jury should be "no", *i.e.* the jury cannot unanimously determine by the appropriate standard of persuasion that the particular circumstance has been proven to exist. As previously stated, this conclusion causes no difficulty with respect to aggravating circumstances. It is well within the province of the Legislature to determine that an aggravating circumstance cannot be considered unless all jurors agree that it has been proven to exist, even though that result is not constitutionally required.

It is quite a different matter, I suggest, for the Legislature to impose as a condition precedent to the collective consideration of relevant mitigating circumstances the requirement that all twelve jurors agree on the existence

of each mitigating circumstance to be considered. As Appellant points out, the result of such a restriction not only would be illogical, but unconstitutional. Following Appellant's hypothetical situation and interpretation of the statute to a logical conclusion demonstrates the point. Because of the six-six split on the two mitigating circumstances, these circumstances have not been unanimously found to exist, and the form will be marked "no" as to each. If no enumerated or separately articulated mitigating circumstance has received the unanimous vote of the twelve jurors, the answers to each of the eight paragraphs of Section II (the mitigating circumstances section) will be "no." The consequence of that situation is as automatic as it is deadly—the jurors are not permitted to engage in the weighing process or any deliberation on the appropriateness of the penalty of death, but are instructed that "[i]f Section II was completed and all of the answers were marked 'no', then enter 'Death'." Assuming there was a single aggravating circumstance in the hypothetical situation we have considered, and assuming that the six jurors who were not persuaded as to the existence of the first mitigating circumstance were the same six who were persuaded of the existence of the second mitigating circumstance in dispute, we are presented with twelve jurors who believe that relevant mitigating circumstances have been proven to exist and yet they are absolutely precluded from engaging in their principal function—the weighing of the aggravating against the mitigating circumstances to determine the appropriate sanction. It is entirely conceivable that if allowed to engage in appropriate deliberation on the ultimate question, the jurors may not be persuaded by a preponderance of the evidence that the aggravating circumstance outweighs the mitigating circumstance that each juror is convinced exists. To prohibit the jury from considering relevant mitigating circumstances is to effectively sever the constitutionally indispensible "link between contemporary community values and the penal system" that the jury is intended to provide. *Woodson v. North Carolina*, 428 U.S. 280, 295, 96 S.Ct. 2978, 2987, 49 L.Ed.2d 944 (1976) (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519, 88 S.Ct. 1770, 1775, 20 L.Ed. 2d 776 (1968)). Drawing on the predicate that the penalty of death is qualitatively different from any other sentence, the Supreme Court said in *Woodson*, 428 U.S. at 304, 96 S.Ct. at 2991:

> [I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

Other hypothetical situations provide more dramatic evidence of the potential dangers of requiring a unanimous verdict on the question of the existence of each individual mitigating factor. If the vote of the jury is eleven to one for the existence of each of three mitigating circumstances and the dissenting vote is cast by a different juror in each instance, we can be certain that all twelve jurors have been convinced by a preponderance of the evidence that at least two relevant mitigating circumstances exist. Yet, because they do not agree on which two exist, the procedure employed in this case would foreclose their consideration of *any* mitigating circumstances, even though they unanimously believe that some relevant mitigating factor has been proven to exist.

To understand the evolution of the Maryland death penalty statute into its present form, and to place in sharp focus the exact nature of the problem as it relates to the required consideration of mitigating circumstances, a brief history of legislative enactments and relevant case law may be helpful.[3] From 1908 until 1972 trial courts of general jurisdiction were vested with discretion to sen-

---

[3] A more detailed history may be found in *Tichnell v. State*, 287 Md. 695, 720-29, 415 A.2d 830 (1980).

tence a person convicted of first degree murder to either death or life imprisonment. In 1972 the United States Supreme Court held that the grant of such unfettered discretion to impose the sentence of death violated the Eighth and Fourteenth Amendments to the Federal Constitution. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972). Responding to *Furman*, this Court promptly declared Maryland's death penalty statute unconstitutional. *Bartholomey v. State*, 267 Md. 175, 297 A.2d 696 (1972). Unfortunately, we read *Furman* as holding "that the death penalty is unconstitutional when its imposition is not mandatory." *Bartholomey*, 267 Md. at 184, 297 A.2d 696. The Legislature responded by passing a mandatory death penalty statute in 1975. Chapter 252, Acts of 1975, codified at Art. 27, § 413 of the Maryland Code (1957, 1976 Repl.Vol.). Within a year the United States Supreme Court held that mandatory death penalty statutes for first degree murder were unconstitutional because they did not permit the sentencing authority to consider mitigating circumstances involving the accused and the character of the offense before deciding whether the imposition of the death penalty was appropriate. *Woodson v. North Carolina*, *supra*; *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). We then held the Maryland mandatory death penalty statute unconstitutional. *Blackwell v. State*, 278 Md. 466, 365 A.2d 545 (1976), *cert. denied*, 431 U.S. 918, 97 S.Ct. 2183, 53 L.Ed.2d 229 (1977).

At the same time it decided *Woodson*, however, the Supreme Court upheld the capital punishment statutes of Georgia, Texas and Florida, finding that the discretion of the sentencing authority had been adequately directed and limited so as to minimize the risk of wholly arbitrary and capricious action, but retained sufficiently to permit consideration of appropriate mitigating factors and thus to maintain the essential link with contemporary community values. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Jurek v. Texas*, 428 U.S. 262, 96

S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Proffit v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Our Legislature then returned to the drawing board and produced a death penalty statute that it believe consonant with the several views expressed in the joint opinions by which *Gregg*, *Jurek* and *Proffit* were decided. Senate Bill 374 was enacted on March 10, 1978, as Chapter 3 of the Laws of 1978, and became effective July 1 of that year. That act established as conditions precedent for the imposition of the death penalty the same eight aggravating circumstances (with minor language changes) that had been contained in the 1975 mandatory death penalty law, but also added seven specific mitigating circumstances that could be considered by the sentencing authority in the ultimate determination of whether death was the appropriate sanction. Two days after the new statute went into effect the Supreme Court held that, with the possible exception of the rarest kind of capital case, a sentencing authority could "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954; 2964-65, 57 L.Ed.2d 973 (1978). Our Legislature responded to *Lockett* by enacting Chapter 521 of the Laws of 1979 to add the following paragraph to the list of mitigating circumstances to be considered by the sentencing authority:

> (8) Any other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case.

This serpentine path of evolution has been aptly described as the "product of a considerable history reflecting the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual." *Eddings v. Oklahoma*, 455 U.S. 104, 110, 102 S.Ct. 869, 874 71 L.Ed.2d 1

(1982). From the earlier concept that only mandatory death sentences would cure the problem of unbridled discretion condemned in *Furman* we have proceeded to an understanding that although the sentencer's discretion must be restricted to ensure that the penalty of death will not be inflicted in an arbitrary and capricious manner, the sentencer must be free to consider any relevant mitigating evidence regarding the character or record of the defendant and any of the circumstances of the offense. *Sumner v. Shuman*, —— U.S. ——, 107 S.Ct. 2716, 95 L.Ed.2d —— [No. 86-246 decided June 22, 1987]; *Hitchcock v. Dugger*, 481 U.S. ——, 107 S.Ct 1821, 95 L.Ed.2d 347 [55 U.S.L.W. 4567] (1987); *California v. Brown*, —— U.S. ——, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987); *Skipper v. South Carolina*, —— U.S. ——, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). We now know that room must be left for interposition of societal judgments of mercy and sympathy that may be engendered by a consideration of relevant mitigating evidence. *Id.* In my view, the Maryland process for jury determination [4] of punishment in a capital case, consisting as it does of the requirements of both statute and rule, retains too much of the vestiges of the mandatoriness and fails to permit meaningful consideration of relevant mitigating circumstances.

The majority seems to suggest that no other application of the requirement of unanimity is possible—that the mandate of unanimity controls not only the verdict but also every subordinate predicate finding. Certainly where unanimity is required, the *verdict* must be unanimous. *State v. McKay*, 280 Md. 558, 375 A.2d 228, 97 A.L.R.3d 1238 (1977); *Ford v. State*, 12 Md. 514 (1859). Furthermore, the determination of any *ultimate issue* essential to the verdict must be unanimous. However, the determination of historic facts present a different question,

[4] Problems created by an improper and mechanical application of the requirement of unanimity are not present when the defendant elects to be sentenced by a judge.

and where alternative findings of historic facts are advanced in support of a single conclusion the better rule is that the jurors need not agree on any single alternative fact provided they all agree on some alternative fact that leads them to a single conclusion on the ultimate issue. For example, in an action for damages arising out of an automobile accident, the jury must be unanimous in its finding on the ultimate questions of duty, breach, causation and damages, and of course on the verdict. Still the jurors need not agree on the historic facts supporting their common conclusion on an ultimate question. If the plaintiff has advanced alternative theories of negligence, *e.g.*, the defendant was speeding, failed to keep a proper lookout, or failed to sound his horn, the jurors may be unanimous in their conclusion that the defendant was negligent, but for different reasons. The Supreme Court of Illinois, writing nearly a century ago, stated the applicable law succinctly:

> The common law requires that verdicts shall be the declaration of the unanimous judgment of the 12 jurors. Upon all matters which they are required to find, they must be agreed. But it has never been held that they must all reach their conclusions in the same way and by the same method of reasoning. . . . To require unanimity . . . not only in the result, but also in each of the successive steps leading to such result, would be practically destructive of the entire system of jury trials. *Chicago & N.W. Ry. Co. v. Dunleavy*, 129 Ill. 132, 22 N.E. 15, 17-18 (1889).

The Court of Special Appeals acknowledged the applicability of this principle to criminal prosecutions in *Craddock v. State*, 64 Md.App. 269, 278, 494 A.2d 971, *cert. denied*, 304 Md. 297 (1985):

> Generally, jurors are not required to uniformly accept all of the evidence presented in order to arrive at a unanimous verdict. Some jurors unquestionably reject evidence that others accept in determining

> guilt or innocence. In short, the law requires unanimity only in the verdict, not in the rationale upon which the verdict is based. In the case *sub judice*, the statute sets forth various acts that constitute the crime of theft. As long as jurors unanimously agree that theft in some form was committed, nothing more is required.

Compare *U.S. v. Gipson*, 553 F.2d 453 (5th Cir.1977). *See also State v. Smith*, 136 Ariz. 273, 665 P.2d 995 (1983), (where jurors are unanimous in finding first degree murder they need not agree on whether it was premeditated or felony murder); *Blake v. State*, *supra*, (if a verdict may be justified upon either of two interpretations of the evidence the verdict cannot be impeached by showing that a part of the jury proceeded upon one interpretation and part upon another); *Clerk v. Commonwealth*, *supra*, (aggravating circumstances are treated as a single unit and jurors need not specify which portion of the unit they find in order to satisfy requirement of unanimity); *State v. Lomagro*, 113 Wis.2d 582, 335 N.W. 2d 583 (1983) (where a single crime is charged, jury unanimity on the particular alternative means of committing the crime is not required if the acts are conceptually similar); *State v. Carey*, 42 Wash.App. 840, 714 P.2d 708 (1986) (jurors need not be unanimous on determination of premeditated or felony murder so long as they are unanimous that one or both have been proved). *Contra*, *State v. Kirkley*, *supra*, 302 S.E.2d at 157 (jury must unanimously agree that a mitigating circumstance exists before it may be considered).

Although the question of unanimity may arise in connection with instructions to be given in cases where a general verdict is to be returned, the problem will be seen more frequently where the case is submitted to the jury on special verdicts or interrogatories. As Dean McCormick pointed out in his article, *Jury Verdicts Upon Special Questions in Civil Cases*, 2 F.R.D. 176 (1941), the

impetus in several states for resort to special questions may have been to provide a check on jury nullification of the law and in some cases to avoid tedious instructions on the law. Dean McCormick concluded that submission on special questions had worked well where a few *ultimate* questions stated in simple-form were submitted, but that submission on multiple subordinate facts and issues had caused difficulty.[5]

The particular problems of jury unanimity in cases involving special verdicts is also discussed by Professor Ruth Ginsburg in *Special Findings and Jury Unanimity in the Federal Courts*, 65 Colum.L.Rev. 256 (1965). As Professor Ginsburg cogently observes, the definition of what constitutes an "ultimate question" and the precise formulation of the question to be put to the jury are matters of considerable importance.

> [W]hen separate fact allegations, each supported by evidence, would independently permit the jury to reach a conclusion on an ultimate issue, appropriate definition of the elements of the case on which the jury must agree poses a problem of more than academic significance. In close cases, the chance of a verdict for one side or the other may be enhanced or restricted depending upon the detail or the generality of the propositions upon which agreement is required. *Id.* at 262.

After discussing two alternatives to a proper definition of the requirement of unanimity, Professor Ginsburg concludes:

> A definition of unanimity in terms of particular facts corresponds to a theoretical image of the jury as a singular body—twelve men who, through the

---

[5] Additional problems resulting from the failure of one or more jurors to join in the answer to a special interrogatory or special verdict are collected in an annotation, Annot., Failure To Join In Special Verdict, 155 A.L.R. 586 (1945).

alchemy of the deliberative process, become as one. In reality, however, perfect harmony, even if it were desirable, is not to be anticipated. A formal requirement of accord on independent particulars, each of which standing alone would support an ultimate finding, impels formal agreement. If each juror subscribes to at least one of the independent particulars, but no particular is subscribed to by all, it seems improbable that the jury would—and out of tune with common-sense notions of justice that the jury should—report itself "hung" rather than proceed to decision. In such a case, if particular fact questions were submitted to the jurors, agreement to answer the "right way" by reporting unanimity on one or more of the particulars would be the more likely course.

> The alternative definition—unanimity upon ultimate issues—appears the more desirable. It takes into account the collective nature of the jury and does not purport to carry the image of a composite individual beyond practical limits. In short, unanimity defined in terms of ultimate issues strikes a balance between two extremes: failure to define the objectives of unanimity and "particular fact" definition. The latter, rigidly and unrealistically, equates the collective judgment of twelve with the individual judgment of a single trier. The former, although it would provide maximum leeway for the "equitable dispensing power" of the jury as a palliative for archaic rules of law, would also constitute an abdication of the judicial function. *Id.* at 268 (footnotes omitted).

Having concluded that the requirement of unanimity is properly applied to the ultimate questions presented by a given case, I turn to the more specific problem of what constitutes the ultimate question or questions in a capital sentencing proceeding. The absolute ultimate question is,

of course, whether death is the appropriate penalty. To reach that question the jury must determine whether one or more of the statutory enumerated aggravated circumstances exist in the case. If one or more aggravating circumstances are found to exist, the jury must determine whether one or more relevant mitigating circumstances exist. The verdict is then determined by the jury weighing the aggravating against the mitigating circumstances and determining whether, by a preponderance of the evidence, the aggravating outweigh the mitigating.

Clearly, the ultimate verdict must be unanimous. In addition, I entertain no doubt that the jurors must be unanimous in their determination that one or more enumerated aggravating circumstances have been proven to exist. As noted earlier, I am not persuaded that there is a constitutional requirement that all jurors agree as to the existence of *each* aggravating circumstance to be considered, but that question is not before us. The Legislature has imposed that requirement by statute, and the requirement does not in any way contravene rights of the defendant.

Not quite as clear, but acceptable to me for the purposes of this case, is the proposition that in order to engage in the ultimate weighing process each juror must determine that one or more relevant mitigating circumstances exist.[6] I do not agree, however, that the Legisla-

---

[6] A strong argument can be made that even in the absence of a finding that one or more mitigating circumstances exist, the jury must be free to reject the sanction of death as the appropriate penalty. The rationale is that although an aggravating circumstance determined by the Legislature to be sufficient to support the penalty of death has been proven, the jurors may agree that the facts of the particular offense are not so egregious as to warrant imposition of the death penalty in a particular case. I agree that this option must be open to the jury, but I conclude that it is under Maryland death sentencing proceedings, and that the problem is one of semantics. Where twelve jurors agree that the circumstances of the offense, although crossing the legal threshold so as to justify

ture may constitutionally require unanimity as to each individual mitigating circumstance before it may be given consideration in the final weighing process. As I have taken some pains to point out, this is a position that extends the requirement of unanimity beyond the ultimate question of whether all jurors believe some relevant mitigating circumstance or circumstances exist, and therefore it is out of step with currently accepted principles of law. More important, however, the requirement may mechanically exclude from consideration by the jury substantial historical facts and mitigating circumstances that might well tip the balance in the final weighing process, and thus it is constitutionally infirm. Unfortunately, our Legislature has imposed precisely that requirement. Read together, subsections (i) and (j) of § 413 require a written determination by the jury, stating "specifically . . . [w]hich, if any, mitigating circumstances it finds to exist."

Returning to the original hypothetical situation, if six jurors believe one mitigating circumstance has been proven to exist and six others believe another has been proven to exist, under the procedure followed in this case none of them can consider either mitigating circumstance in the final weighing process. Indeed, no matter how many jurors believe how many mitigating circumstances exist, no one will be allowed to consider any of them unless all twelve happen to agree on a single one. Nor does the presence of a "catchall" provision cure the deficiency, at least as it appears in the statute and the rule. After listing seven mitigating factors the jury should consider, subsection (g)(8) of the statute adds "[a]ny *other* facts which the jury . . . specifically sets forth

---

consideration of the death penalty, do not in fact warrant death in the particular case, that jury has in fact found a *mitigating circumstance* even though it may be difficult to articulate. Trial judges and counsel should make this clear to the jury through appropriate instructions and argument.

in writing that it finds as mitigating circumstances in the case." (emphasis added). Manifestly, this language excludes the possibility that individual judgments concerning the seven circumstances previously considered could somehow be worked into this section. Moreover, by requiring in the same format that the jury state specifically and in writing any other facts that it finds as mitigating circumstances, the statute and rule perpetuate the requirement for specific unanimity as to historical facts rather than unanimity on the collective existence of relevant mitigating circumstances.[7]

I appreciate the fact that entirely legitimate concerns about the need to impose limitations on "unbridled discretion" and the need to provide as much information as possible for proportionality review have prompted the extraordinary requirements for precision and written findings. But we have gone too far. In an attempt to cure one problem we have caused another—not, as we have seen, an unusual occurrence in the difficult process of reaching an acceptable middle ground between important but conflicting interests in this area of the law. The process must be as simple and as fair as we can make it. We must be strict in the requirement that no person be considered for the death penalty unless and until there has been a unanimous finding, beyond a reasonable doubt, of the existence of one or more statutory enumerated aggravating circumstances. But we must be liberal in allowing the jury to consider evidence of any relevant mitigating circumstance

---

[7] One could argue that there is nothing to stop a jury from writing in as a "catchall" mitigating circumstance that "we unanimously conclude from a consideration of the aggravating and mitigating circumstances disclosed by the evidence that death is not the appropriate penalty" or words to that effect. The difficulty is that the form and the statute direct the jurors away from, instead of toward that type of determination. In the absence of a specific instruction from the judge informing the jury that they would be permitted to make such an entry if they so found, I have no confidence that the jury could reach that conclusion on its own.

and in allowing every juror to utilize in the ultimate weighing process every mitigating circumstance proved by a preponderance of the evidence satisfactory to that juror. If any individual juror is not persuaded of the existence of any relevant mitigating circumstance, there will of course be no weighing of circumstances, and the verdict will either be death, or the jurors will be unable to agree. However, if all twelve jurors believe there are mitigating circumstances, the ultimate weighing process must be allowed to take place.

To briefly summarize the foregoing discussion, I conclude as follows. First, that the statute requires and the Legislature intended to require as a condition precedent to the consideration of any aggravating or mitigating circumstance, the unanimous agreement of the jurors as to the *existence* of that circumstance. Second, that the statute does not require, nor did the Legislature intend to require, any finding by the jury that a particular circumstance *does not exist*, either unanimously or otherwise. Third, that because of the imposition of an artificial and wholly unnecessary requirement of unanimity as to *each* mitigating circumstance, the statute unconstitutionally precludes jury consideration of relevant collective mitigating circumstances.

Applying these principles to the case before us persuades me that the sentence of death must be reversed. It is entirely possible, and indeed I suggest very probable, that this jury answered "no" as to certain aggravating and mitigating circumstances because they were not unanimous in their belief that the circumstance had been proven to exist, and not because they unanimously agreed that it did not exist. The trial judge's instructions were entirely consistent with the interpretation of the statute that I believe to have been intended by the Legislature. After referring to the sentencing form that had been distributed to the jurors, and discussing the requirement of unanimity with respect to a finding of the existence of aggravating circumstances, the trial judge said:

> Let me, before we begin the enumeration of the items of aggravating circumstances, remind you that in order to answer any of those questions yes you must be unanimously satisfied beyond a reasonable doubt of the existence of one of those aggravating circumstances.

The judge then defined the burden of persuasion, and said:

> If, after consideration and comparison of the evidence you have heard this morning, you cannot find an abiding conviction to a moral certainty of the existence of an aggravating circumstance, then reasonable doubt does exist and you must answer no.

The trial judge then pointed out that the State had given notice only as to aggravating circumstance number two, and he said:

> Now in considering these matters, you must consider whether aggravating circumstance number two has been proven beyond a reasonable doubt. If you unanimously conclude that it has been so proven, you should answer that question yes. If you are not so satisfied, *then of course you must answer no.* (emphasis added).

Concerning the requirement of unanimity with respect to the existence of mitigating circumstances, the trial judge instructed in the language of the form that was before the jury.

If, as I suspect, the jury followed logic and the trial judge's instructions rather than the strained interpretation of the meaning of a "no" vote put forth by the majority, it follows that a number of the jurors may have been persuaded of the existence of certain mitigating circumstances, but agreed to marking them "no" because the jury did not unanimously find their existence. Moreover, because the trial judge instructed in accordance with the

statute, there was no opportunity for the jurors to incorporate within the "catchall" section any individual judgments they may have reached concerning the enumerated mitigating circumstances. Judge Sharer instructed them:

> Now number eight indicates, other mitigating circumstances exist as set forth below. Should you find any *other* mitigating circumstances *not specifically enumerated in the first seven* that we have just reviewed which have been raised by the evidence and proved to you by a preponderance of that evidence you may so indicate. . . . If you find no other mitigating circumstances then you make no entry upon those lines under number eight. (emphasis added).

The jury unanimously found one aggravating circumstance to exist, but was unable to agree unanimously on the existence of any particular mitigating circumstance.[8]

Thus, the hypothetical posed by Appellant comes to life. This jury was precluded from a consideration of mitigating circumstances that should have been permitted. It was precluded from engaging in any weighing of aggravating and mitigating factors by the draconian instruction that "if Section II was completed and all of the answers were marked "no" then enter "Death."

The majority's conclusion that when the jury answers "no" it means that every juror agrees that the circumstance in question does not exist (or perhaps more precisely, that every juror agrees the circumstance has not been proven to exist by the requisite standard of persuasion) solves the problem of mandatoriness—if every answer with respect to mitigating circumstances is "no"

[8] The possibility that the jury could have fashioned some type of collective mitigating circumstance under the "catchall" provision was further diminished by the trial judge's instruction that if the jurors found any "other" mitigating circumstances, they "must write them in the space provided and number them so that they may be distinguished one from the other."

there cannot be a single juror who believes that a single mitigating circumstance exists. But this poses another problem. If "yes" means all jurors agree that the circumstance does exist, and "no" means all jurors agree that the circumstance does not exist, what is to happen when there is disagreement? According to the interpretation I favor, if the disagreement cannot be resolved the circumstance has not been unanimously proven and the jury marks "no" and moves on. But according to the majority, the jury could not answer "yes" or "no," and it would seem the result would be a mistrial. Given the number of aggravating and mitigating circumstances that may be considered, and the improbability that twelve persons could unanimously agree as to the existence or non-existence of each, the likelihood of a mistrial under that interpretation would be quite high. To avoid that result, which I agree would be unfortunate, the majority simply announces that when the jurors disagree, they do not answer "yes" or "no" but rather leave the answer blank and proceed to the next question.

Apart from the fact that this holding appears out of the blue after nearly ten years of extensive litigation involving this statute,[9] it is inconsistent with the majority's basic premise that the existence or non-existence of aggravating and mitigating circumstances are *ultimate* facts requiring unanimity for resolution, and without the resolution of which a mistrial must be declared. I quote from the majority, at 60:

> [T]he presence *or absence* of aggravating and mitigating circumstances, and the weighing of aggravat-
>
> • • • •

[9] I have examined the sentencing forms that were completed in twenty-five previous capital cases in which the death penalty was imposed and I have not found a single instance in which the answer as to the existence of aggravating or mitigating circumstances was left blank.

> ing against mitigating circumstances, all fall into the category of "ultimate issues."
>
> The cases regularly point out that unanimity is required for a jury determination on either side of an issue, . . . and that the failure to achieve unanimity on either side of an issue ordinarily results in a hung jury.

One cannot simultaneously run with the hare and hunt with the hounds. Either a mitigating circumstance is an ultimate fact requiring unanimous concurrence as to existence before it can be considered, or it is a predicate or historic fact not saddled with the requirement of unanimity as to its existence.

Although we are poles apart in analysis, the majority and I are in essential agreement as to the basic principles of law that control in a capital sentencing proceeding. An aggravating circumstance can be found to exist only by unanimous agreement of the jury, and no aggravating circumstance may be considered unless it has been found to exist. A mitigating circumstance, on the other hand, must be considered by each juror who believes it to have been proven to exist, irrespective of whether all jurors agree that it exists. Where any individual juror believes a mitigating circumstance exists, that juror must consider that circumstance whether or not it appears on the sentencing form in any of the eight categories. Where one or more aggravating circumstances have unanimously been proven to exist, each juror who believes a mitigating circumstance exists must weigh the aggravating against the mitigating circumstances, and may not vote for death unless persuaded that the aggravating outweigh the mitigating.

I would vacate the sentence of death, however, because the jury in this case was not informed, by instruction or by the sentencing form, of the interpretation of the statute announced for the first time today. The jurors

may well have believed their answer of "no" meant that they could not unanimously agree that a mitigating circumstance had been proven. Never were they told that if they disagreed, they could leave the answer blank and proceed. Instead, they were told that "[y]ou must answer yes or no as to each of these circumstances."

I need not address the question of whether our death penalty statute, as rewritten by this Court in this case and in *Foster v. State*, 304 Md. 439, 499 A.2d 1236 (1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 3310, 92 L.Ed.2d 723 (1986), may be constitutionally applied. Trial judges would do well, however, to instruct in accordance with the principles developed by the cases, and avoid instructing in the literal language of the statute. Additionally, this Court should promptly revise Rule 4-343 to correct the sentencing determination form.

I would affirm the conviction, but vacate the sentence of death and remand the case for a new sentencing proceeding.

SUPREME COURT OF THE UNITED STATES

No. 87-5367

RALPH MILLS,

Petitioner

v.

MARYLAND

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

December 7, 1987

(5)

Supreme Court, U.S.
FILED
JAN 14 1988
CLERK

No. 87-5367

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RALPH MILLS, *Petitioner,*

v.

STATE OF MARYLAND, *Respondent,*

On Writ Of Certiorari To The Court Of Appeals Of Maryland

PETITIONER'S BRIEF

ALAN H. MURRELL
Public Defender of Maryland
GEORGE E. BURNS, JR.*
Assistant Public Defender
Appellate Division, 6th Flr.
201 St. Paul Place
Baltimore, Maryland 21202
(301) 333-4842
MICHAEL R. BRAUDES
Assistant Public Defender
JULIA DOYLE BERNHARDT
Assistant Public Defender
MARK COLVIN
Assistant Public Defender
JOSE' FELIPE' ANDERSON
Assistant Public Defender
Counsel for Petitioner
**Counsel of Record*

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

6 cc

QUESTIONS PRESENTED

1. May the Maryland Court of Appeals place a strained and unrealistic construction upon the Maryland death penalty statute in order to defeat a contention that the statute is unconstitutionally mandatory in its application?

2. Was the Maryland death penalty statute applied to Petitioner's case in an unconstitutionally mandatory manner?

3. Must Petitioner's sentence of death be vacated because of the admission of victim impact evidence?

TABLE OF CONTENTS

OPINION BELOW 1
JURISDICTION 1
CONSTITUTIONAL PROVISIONS 1
STATUTES 1
RULE 1
STATEMENT OF THE CASE 1
SUMMARY OF ARGUMENT 7
ARGUMENT I & II:
THE MARYLAND DEATH PENALTY STATUTE WAS APPLIED TO PETITIONER'S CASE IN AN UNCONSTITUTIONALLY MANDATORY MANNER 9
ARGUMENT III:
PETITIONER'S SENTENCE OF DEATH WAS TAINTED BY THE ADMISSION OF VICTIM IMPACT EVIDENCE 21
CONCLUSION 25
APPENDIX 1a

TABLE OF AUTHORITIES

Cases — Page

Andres v. *United States*, 333 U.S. 740 (1948) 12, 19
Apodaca v. *Oregon*, 406 U.S. 404 (1972) 10
Ashton v. *Kentucky*, 384 U.S. 195 (1966) 20
Blumenthal v. *United States*, 332 U.S. 539 (1947) 13
Booth v. *State*, 306 Md. 172, 507 A.2d 1098 (1986) 18
Booth v. *Maryland*, 482 U.S. ___, 107 S.Ct. 2529 (1987) 9, 18, 21, 23
Bouie v. *City of Columbia*, 378 U.S. 347 (1964) 21
Burch v. *Louisiana*, 441 U.S. 130 (1979) 24
California v. *Brown*, ___ U.S. ___, 107 S.Ct. 837 (1987) 18
Eddings v. *Oklahoma*, 455 U.S. 104 (1982) 10
Evans v. *State*, 304 Md. 487, 499 A.2d 1261 (1985) 18
Foster v. *State*, 304 Md. 439, 499 A.2d 1236 (1985) .. 2, 11, 18
Frances v. *Franklin*, 471 U.S. 307 (1985) 16
Hicks v. *Oklahoma*, 447 U.S. 343 (1980) 19, 20, 21
Hitchcock v. *Dugger*, ___ U.S. ___, 107 S.Ct. 1821 (1987) 10, 18
Ivan V. v. *City of New York*, 407 U.S. 203 (1972) 21
Johnson v. *State*, 292 Md. 405, 439 A.2d 542 (1982) .. 17, 18
Jones v. *State*, 310 Md. 569, 530 A.2d 743 (1987) 12
Lockett v. *Ohio*, 438 U.S. 586 (1978) 10
Opper v. *United States*, 348 U.S. 84 (1954) 13
Sandstrom v. *Montana*, 442 U.S. 510 (1979) 17
Skipper v. *South Carolina*, 476 U.S. ___, 106 S.Ct. 1669 (1986) 10
State v. *Moulden*, 292 Md. 666, 441 A.2d 699 (1982) 14
State v. *Reynolds*, 41 N.J. 163, 195 A.2d 449 (1963) 12
Sumner v. *Shuman*, 483 U.S. ___, 107 S.Ct. 2716 (1987) 10
Tichnell v. *State*, 287 Md. 695, 415 A.2d 830 (1980) 17
White v. *State*, 300 Md. 719, 418 A.2d 201 (1984) 4
Zant v. *Stephens*, 462 U.S. 862 (1983) 10

MISCELLANEOUS

J. Stephen, *A History of the Criminal Law of England* (1983) 10

OPINION BELOW

The opinion of the Court of Appeals of Maryland is reported at 310 Md. 33, 527 A.2d 3 (1987), and is reproduced in the Joint Appendix at 109.

JURISDICTION

The opinion of the Court of Appeals of Maryland was filed on June 25, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE

The following are set forth in the Appendix to this Brief:

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendments VIII, XIV.

STATUTES

Md. Code (1957, 1982 Repl. Vol., 1987 Cum. Supp.), Art. 27, §§ 412, 413, 414; Art. 41, § 4-609(c).

RULE

Maryland Rules of Procedure, Former Rule 4-343, Rule 4-343 as amended.

STATEMENT OF THE CASE

Petitioner, Ralph Mills, was tried by a jury in the Circuit Court for Allegany County, Maryland, and convicted of first-degree murder. The same jury sentenced Petitioner to death. The Court of Appeals of Maryland affirmed Petitioner's conviction and sentence, with one judge concurring in the result and one judge dissenting. On December 7, 1987, this Court issued a writ of certiorari.

At trial, the State adduced evidence that on August 6, 1984, while an inmate at the Maryland Correctional Institution in Hagerstown, Maryland, Petitioner stabbed to death his cell-mate Paul Robin Brown with a "shank" or home-made knife.

The Operation Of The Maryland Death Penalty Law

Under Art. 27, § 413 of the Maryland Code, the death penalty may be sought by the prosecution if the defendant is convicted of first-degree murder. After conviction, a separate sentencing proceeding is conducted. At that hearing, the prosecution must prove one or more statutory aggravating circumstances beyond a reasonable doubt; if no aggravating circumstance is established, a life sentence is imposed. If one or more aggravating circumstances are established, the statute places upon the defendant the burden of establishing by a preponderance of the evidence one or more mitigating circumstances. If the sentencer[1] finds that one or more aggravating circumstances exist, but that no mitigating circumstance has been proved by the defense, Art. 27, § 413(h) mandates that the penalty must be death, without any further weighing of circumstances. If the sentencer finds that both aggravating and mitigating circumstances exist, section 413(h) mandates that "it shall determine whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances."[2] If the mitigating circumstances do not outweigh the aggravating circumstances, "the sentence shall be death." Art. 27, § 413(h)(2).

[1] The defendant may elect to be sentenced by the judge or jury which participated in the guilt or innocence phase of the prosecution.

[2] The Court of Appeals has held that this language places the burden of persuasion on the State. *Foster* v. *State*, 304 Md. 439, 499 A.2d 1236 (1985).

The statute is implemented by a sentencing verdict form, called a "Findings and Sentencing Determination" form, which instructs the sentencer in the determinations that it must make with respect to aggravating circumstances, mitigating circumstances, and the consequences of its determinations on these matters. The form is mandated by the Maryland Rules of Procedure, Rule 4-343; the form as completed by the jury that sentenced Petitioner appears in the Joint Appendix at J.A. 99.

The form is divided into sections, with Section I listing aggravating circumstances and Section II listing mitigating circumstances. The sentencer is instructed that if one or more of the aggravating circumstances in Section I are marked "yes", then Section II is to be completed. The form goes on to advise that "If Section II was completed and all of the answers were marked "no" [indicating that the jury found one or more aggravating circumstances but no mitigating circumstances], then enter "Death"." Until the form was substantially revised in light of the opinion of the Court of Appeals in this case,[3] the form called for a "yes" or "no" response to each aggravating or mitigating circumstance but made no specific provision for a situation where there was not unanimous agreement as to a specific mitigating circumstance.

The Sentencing Proceeding In Petitioner's Case

The jury found a single aggravating circumstance—that "[t]he defendant committed the murder at a time

[3] The revised form, Maryland Rule 4-343 (as amended, 1987) appears in the Appendix to this Brief at Apx. 21a.

when confined in any correctional institution." Art. 27, § 413(d)(2).

At the sentencing hearing, evidence was adduced from which the jury could have found a number of mitigating circumstances:

1. Petitioner's youthful age (20).
2. Petitioner's low I.Q.
3. The termination of Petitioner's education in the sixth grade.
4. Petitioner's psychological and emotional problems, and the failure of society to adequately provide care and treatment.
5. The arbitrary administration of the death penalty, resulting in a situation where some individuals face the possibility of execution while equally culpable individuals do not.
6. Doubt regarding the circumstances leading up to the stabbing of Paul Brown.
7 The unlikelihood that Petitioner will be a continuing threat to society (§ 413(g)(7)).[4] (J.A. 87-93.)

The jury was instructed that it could consider mitigating circumstances only if it reached unanimous agreement. (J.A. 69, 73.)

---

[4] In addition to these matters, the record also reflects Petitioner's involvement in drugs. (J.A. 52.) Although defense counsel did not argue that this was a mitigating circumstance, under Maryland law the sentencer is free to find mitigating factors not articulated by the defense in argument. *White* v. *State*, 300 Md. 719, 740, 481 A.2d 201 (1984).

The jury marked "no" for each mitigating circumstance and sentenced Petitioner to death.

Victim Impact Evidence

In his opening statement, the prosecutor argued to the jury:

> But you haven't heard that much about Paul Brown. And in particular. you haven't heard anything about the victims of this murder. You haven't heard anything about his surviving relatives and how they feel.
>
> Now under the law I can't call them to the stand. But under the law I can make available to you and you can inspect, you can read through the entire thing what's called a victim impact statement. And what this is is essentially a letter. It's actually a summary of a conversation between the victim, Paul Brown's, surviving brother and his wife, who is Paul Brown's sister-in-law, and a lady who works with the State's Attorney's Office in Hagerstown who is what is known as the victim witness coordinator. And she had a conversation with them about how they feel, about how Paul Brown's brother feels now that his brother is dead. And that's going to be something that you're going to have to consider when you're deciding what to do with the penalty in this case. And I believe there's no one who would question that that's right. Because for a long time the law in this country and the criminal justice system in this country was getting away from victims, and they were not being considered properly. And I want you to take that very seriously as everything else. I want you to include that in your deliberations when you're deciding what to do. (J.A. 11-12.)

Shortly thereafter, the prosecutor referred to himself "as the only person available to talk for Paul Brown and his surviving relatives." (J.A. 13.)

In offering into evidence the letter to which he had referred, the prosecutor asked the court clerk to mark "the victim impact statement." (J.A. 14.) Defense counsel stated that he had no objection, and the document was admitted as State's sentencing exhibit 2.

During closing argument, the prosecutor read the statement to the jury:

> And I'm now going to read you something which you will also be able to read for yourself, but which I believe . . . the State believes is very meaningful and proper. Recall my opening statement on the sentencing phase. For a long time the law was getting away from the purpose of the criminal justice system. Not just to enforce the law, but also to punish those who leave behind them victims. You never heard much about the victims. I can't call them . . . by law I can't call them to the stand to tell you how they feel. By law I can't call the surviving relatives of Paul Brown to tell you how they feel about the fact that Paul Brown isn't around any more, and about the fact that he was murdered. But what I can do is this. I can read you this victim impact statement, and I'm going to do it.
>
> This is a summary of an interview with Paul Brown's brother Thomas and his wife Jean. You remember Jean who testified and had to identify Paul Brown from one of the photographs which is in evidence. This is what it says.
>
> "Paul and Thomas Brown came from a family of six. At a very young age, they were removed from their parents' custody because of neglect and placed in separate foster homes. Removal by the Department of Social Services was prompted by Paul being hospitalized at age four for anemia and malnutrition.
>
> "Paul was a hyperactive child and hard to handle, which resulted in a lot of beatings from his

> various guardians. He ran away constantly from the various homes in which he had been placed. After a while, Paul, at the age of fifteen, just started living on the streets. He was eventually sent to the Maryland Training School for Boys.
>
> "Paul never really had a home or a family as such. I . . ." Now this is his brother speaking. "I tried to keep in touch with Paul by writing and visiting him whenever possible. I always had good homes and a good life, and always felt guilty that there was nothing I could do to help Paul. After all, I was only one year older than he. Paul was a good person who had a tough life, a lot of bad breaks, no family, no home, nobody to really give him a chance. I sometimes think he felt more secure in prison, because he had no one on the outside. Sure he committed crimes. But he wasn't violent. He did what he had to do to survive, and he got involved with a lot of bad people." And that is what is in the victim impact statement. And it's for you to read. It's part of the record in this case.

(J.A. ____.)

SUMMARY OF ARGUMENT

I. & II.

The question of whether the Maryland Legislature may constitutionally require unanimous agreement on mitigating circumstances must be considered in historical context. Historically, the requirement of unanimity has always been for the protection of the defendant.

Only by permitting the sentencer to consider all relevant evidence can a capital sentencing scheme narrow in a fair manner the class of defendants deserving the ultimate punishment. In a capital case, because of the qualitative difference between death and other punishments, it is of vital importance that the decision to impose death be, and

appear to be, based on reason rather than caprice or emotion. Thus, the severity of the sentence mandates careful scrutiny in the review of colorable claims of error. With these considerations in mind, it is difficult to imagine a system more arbitrary than one where a single juror may dictate a sentence of death. The result that a single juror may preclude meaningful use of mitigating circumstances is equally unjustifiable. Solving the problem through statutory interpretation, the Court of Appeals construed the statute to mean that where one or more jurors find that a mitigating circumstance exists, and it is not outweighed by the aggravating circumstance or circumstances, a life sentence must be imposed. Implicit in this holding is the clearly correct conclusion that it is unconstitutional to require unanimity in finding mitigating circumstances.

This construction of the statute, however, did not govern the actual deliberations of the jury in this case. The jury below was instructed that mitigating circumstances could be considered only if all twelve jurors were persuaded of the existence of a particular mitigating circumstance. Thus, it could not have applied the Court of Appeals' interpretation of the statute. In addition, the sentencing verdict form that guided the jury's deliberations also made provisions only for unanimous findings on mitigating circumstances.

The question in this case is what a reasonable juror would have understood the instructions to mean. The only way in which a reasonable jury could have understood the instructions in this case was that in order to be considered in the weighing process, a mitigating circumstance must be the subject of unanimous agreement. The trial judge's failure to properly instruct the jury as to the exercise of

its statutory discretion denied Petitioner due process of law.

II.

Victim impact evidence is irrelevant to a capital sentencing decision and is, therefore, inadmissible. The Court of Appeals in this case held that evidence adduced at the sentencing hearing describing the personal qualities of the victim was not victim impact evidence. This holding is inconsistent with this Court's decision in *Booth* v. *Maryland*, 482 U.S. ___, 107 S.Ct. 2529, 2533 (1987).

ARGUMENT

I. & II. THE MARYLAND DEATH PENALTY STATUTE WAS APPLIED TO PETITIONER'S CASE IN AN UNCONSTITUTIONALLY MANDATORY MANNER.

The underlying question is whether the Maryland Legislature may constitutionally require unanimous agreement by the jurors before any mitigating circumstance may be considered in the weighing process. The question, of course, must be considered in historical context.

> The rule which required unanimity is, I think, easily explained historically, and easily justified on grounds of expediency. The historical explanation appears from the passage already quoted from Bracton, Britton, and other early authorities. The jurors were required to be unanimous because they were witnesses, and the rule was that twelve witnesses, or persons taken as witnesses, must swear to the prisoner's guilt before he could be convicted.
>
> The justification of the rule, now that the character of the jury has changed from that of witnesses to that of judges of fact, seems to me to be that it is a direct

> consequence of the principle that no one is to be convicted of a crime unless his guilt is proven beyond all reasonable doubt. How can it be alleged that condition has been fulfilled so long as some of the judges by whom the matter is to be determined do in fact doubt?

J. Stephen, 1 *A History of the Criminal Law of England* 304-305 (1983). Although other explanations for the rule of unanimity have been suggested, *see Apodaca* v. *Oregon*, 406 U.S. 404, 407 n.2 (1972), it has never been doubted that the requirement has always been for the *protection of the defendant*. A procedure where the requirement of unanimity benefits the prosecution thus begins life as a historical curiosity.

The purpose of capital sentencing procedures is to narrow in a fair and controlled manner the class of defendants to those deserving the ultimate punishment. This Court has repeatedly held that this purpose can be achieved only by permitting the sentencer to consider all relevant mitigating circumstances and evidence. *Skipper* v. *South Carolina*, 476 U.S. ___, 106 S.Ct. 1669 (1986). *See also Hitchcock* v. *Dugger*, ___ U.S. ___, 107 S.Ct. 1821 (1987); *Sumner* v. *Shuman*, 483 U.S. ___, 107 S.Ct. 2716 (1987); *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982); *Lockett* v. *Ohio*, 438 U.S. 586 (1978).

The standard of review for determining whether a statute meets the foregoing requirements was set forth in *Zant* v. *Stephens*, 462 U.S. 862, 884-85 (1983):

> On the other hand, because there is a qualitative difference between death and any other permissible form of punishment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Thus, although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state-court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error.

(Citations omitted.)

It is with the foregoing considerations in mind that the requirement that mitigating circumstances must be the result of unanimous agreement must be analyzed. A single practical example of the requirement will suffice. If eleven jurors agree that there are six mitigating circumstances, the result is that no mitigating circumstance is found. Consequently, there is nothing to weigh against any aggravating circumstance found and the judgment is death even though eleven jurors think the death penalty wholly inappropriate.[5]

It is difficult to imagine a system more arbitrary than one where a single juror may dictate a sentence of death.[6]

---

[5] In Maryland,

> [a] sentencing authority, unconvinced that death is appropriate, may list as a mitigating circumstance whatever factor or factors may have led to this conclusion, irrespective of what the defendant produced or argued. If the sentencing authority perceives anything relating to the defendant or the crime which causes it to believe that death may not be appropriate, it may treat such factor as a mitigating circumstance and decide that it outweighs the aggravating circumstances.

Foster v. *State*, 304 Md. 439, 474-475, 499 A.2d 1236 (1985), *cert. denied*, 106 S.Ct. 3310 (1986). The problem is that this mitigating circumstance, like any other mitigating circumstance, could be vetoed by a single juror.

[6] The suggestion that a single juror should have the power to impose the death penalty has been firmly rejected even without resort to the Constitution. Thus, where the jury was to decide the penalty and could preclude death by a recommendation of leniency,

The result that a single juror may preclude meaningful use of mitigating circumstances is equally unjustifiable. The price of failure is not a deadlocked jury and retrial as in any other proceeding, but, rather, death. The Court of Appeals avoided this problem through statutory interpretation. It construed the statute to mean that where one or more jurors find that a mitigating circumstance exists, and it is not outweighed by the aggravating circumstance or circumstances, a life sentence must be imposed. *See also Jones* v. *State*, 310 Md. 569, 599-604, 530 A.2d 743 (1987). Implicit in the resolution of the case by the majority of the Court of Appeals is the holding that a requirement of unanimity in finding mitigating circumstances is unconstitutional. This conclusion is clearly correct.

This construction of the statute, however, did not govern the actual deliberations of the jury which sentenced Petitioner to die. Those deliberations were controlled by jury instructions and a sentencing determination form which permitted mitigating circumstances to be considered only if all twelve jurors were persuaded of the existence of a particular mitigating circumstance.

Initially, the trial judge instructed the jury that the instructions "are binding upon you, and you must absolutely follow them in making your findings and determina-

---

the New Jersey Supreme Court refused to hold that such recommendation must be unanimous.

> We do not believe the Legislature intended that a man should go to his doom because one juror disagreed with eleven who thought life imprisonment was the just penalty.

State v. *Reynolds*, 41 N.J. 163, 187, 195 A.2d 449 (1963), *cert. denied*, 377 U.S. 1000 (1964). See also *Andres* v. *United States*, 333 U.S. 740 (1948).

tions as to the sentence in this case." (J.A. 68.) The jurors were then directed to consider mitigating circumstances only if they reached unanimous agreement.

> Let me remind you that in reaching your determination *as to any of the issues raised by the case* and presented to you on this sentencing form your verdict must be *unanimous;* that is, all twelve of you must agree.

(J.A. 69.) (Emphasis added.) Subsequently, after listing the possible mitigating circumstances, the trial court reiterated the same point:

> Again let me stress the requirement of *unanimity,* that is *your finding under section two [mitigating circumstances]* and your findings under section three [weighing of mitigating against aggravating circumstances] must be one in which all twelve of you agree.

(J.A. 73.) (Emphasis added.)

The court's instructions did not provide for consideration of evidence in mitigation if eleven or fewer jurors were persuaded of the existence and force of such evidence. The jury was not instructed that it should impose a death sentence only if it found that the aggravating circumstance was sufficiently weighty to justify that sanction nor that death should be imposed only if it were justified under all the facts and circumstances. Thus, unless the jury ignored the instructions requiring a unanimous finding of mitigating circumstances, it could not have applied the Court of Appeals' interpretation of the statute. *See Opper* v. *United States*, 348 U.S. 84, 95 (1954) ("Our theory of trial relies upon the ability of a jury to follow instructions."); *Blumenthal* v. *United States*, 332 U.S. 539, 553 (1947) (It cannot be assumed that the jury

"misunderstood or disobeyed" an unambiguous instruction from the trial judge.)[7]

The sentencing verdict form that guided the jury's deliberations also made provision only for a unanimous finding that a mitigating circumstance existed. Section II of the form begins with the following instruction:

> Based upon the evidence we unanimously find that each of the following mitigating circumstances which is marked "yes" has been proven to exist by a preponderance of the evidence and each mitigating circumstance marked "no" has not been proven by a preponderance of the evidence.

Following this instruction is a list of mitigating circumstances followed by a place to state "yes" and a place to state "no." There is no place, however, to provide an answer other than yes or no, and no suggestion that it is ever proper to leave a section of the form blank. Therefore, as was pointed out by the dissent below, the

> jury in this case was not informed, by instruction or by the sentencing form, of the interpretation of the statute announced for the first time today. The jurors may well have believed their answer of "no" meant that they could not unanimously agree that a mitigating circumstance had been proven. Never were they told that if they disagreed, they could leave the answer blank and proceed. Instead, they were told that "[y]ou must answer yes or no as to each of those circumstances."

(J.A. 170-171.)

The conclusion that a divided vote upon a particular mitigating circumstance results in its complete exclusion

---

[7] Maryland law similarly recognizes the binding force of jury instructions. *See, e.g., State* v. *Moulden*, 292 Md. 666, 678 and n.8, 441 A.2d 699 (1982) ("Our legal system necessarily proceeds on the assumption that jurors will follow the trial judge's instructions . . .").

from consideration is confirmed by reviewing the sentencing forms completed by juries in past capital cases in Maryland, and by contrasting those forms with the form that was promulgated on an emergency basis by the Court of Appeals after it rendered its decision in this case.[8] See Maryland Rule 4-343. On past forms every mitigating circumstance was marked either "yes" or "no." No space was ever left blank, and no form ever reflected a divided vote. It is improbable that every vote upon individual mitigating circumstances resulted in unanimous agreement. It follows that many of the "no" answers reflect a divided vote in which the individuals who were persuaded of the existence of a mitigating circumstance were prevented from giving it any consideration. Indeed, in two sentencing proceedings conducted since the decision in this case, when the jury was given the option of reporting non-unanimous votes on mitigating circumstances, it did so.[9]

---

[8] The forms from past cases are collected in the Lodging for the Convenience of the Court (hereinafter cited as L. ____). The form utilized subsequent to the decision of the Court of Appeals appears at Apx. 21a. The forms are prepared pursuant to Maryland Rule 4-343, which provides that in all cases where the State seeks the death penalty and the defendant is convicted of first-degree murder, the trial judge shall prepare a report of the sentencing and transmit it to the Court of Appeals.

[9] In *State of Maryland* v. *Ronald Wooten-Bey*, Case No. C.T. 83-1497C, Circuit Court for Prince George's County, the jury responded to *six* mitigating factors (three statutory and three non-statutory) in this manner. (L. 229.)

In *State of Maryland* v. *Al Wayne Doering*, Case No. 86CR6128, Circuit Court for Baltimore County, the jury used a sentencing form that directed the jurors to leave the form blank with respect to a mitigating factor respecting which one or more, but less than all, of the jurors were persuaded. Significantly, the sentencing jury left

Implicitly recognizing the deficiency in the procedure by which Petitioner was sentenced, the Court of Appeals promulgated a new sentencing form on an emergency basis after its decision in the instant case. Unlike its predecessors, new Maryland Rule 4-343 provides the following possible response to each mitigating circumstance:

> After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

A new Section IV of the new form further provides:

> *Each individual juror* shall weigh the aggravating circumstances found unanimously to exist against any mitigating circumstances found unanimously to exist, *as well as any mitigating circumstances found by that individual juror to exist.*

(Emphasis added.) Such *individual* weighing of mitigating circumstances found by a juror *as an individual* was absent from the sentencing form utilized at Petitioner's hearing. Thus, it is impossible to conclude, as did the Court of Appeals, that the jury understood that mitigating circumstances not unanimously found could nevertheless be considered in the balancing process. Indeed, the form used by the jury in this case made no such provision.

As this Court noted in *Francis* v. *Franklin*, 471 U.S. 307, 315-16 (1985):

> The question . . . is not what the State Supreme Court declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning. *Sandstrom* [v. *Montana*, 442 U.S. 510, 516-517 (1979)] (state court "is not the final authority on the interpretation which a jury could have given the instruction").

unmarked the mitigating circumstance relating to the impaired mental capacity of the defendant, suggesting a divided vote on that issue. (L. 221).

The only way in which a reasonable jury could have understood the instructions on mitigating circumstances given in this case was that in order to be considered in the weighing process, the circumstance must be one upon which the jury unanimously agreed. Thus, the conclusion of the Court of Appeals that the jury in this case sentenced Petitioner in accordance with the interpretation of the statute announced below is without foundation.[10]

[10] On a prior occasion, the Court of Appeals redrafted the statute to defeat a constitutional challenge. At issue was the provision of the statute, Art. 27, § 413(h), that allocates the ultimate burden of proof on weighing aggravating against mitigating circumstances. The statute provides:

> (h) Weighing mitigating and aggravating circumstances.—(1) If the court or jury finds that one or more of these mitigating circumstances exist, it shall determine whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances.
>
> (2) If it finds that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death.
>
> (3) If it finds that the mitigating circumstances outweigh the aggravating circumstances, the sentence shall be imprisonment for life.

Capital defendants in Maryland consistently challenged this provision on the ground that it unconstitutionally allocates the burden of proof to the defendant. The Attorney General of Maryland, who represents the State on appeal in capital cases, conceded that the statute places the burden upon the defense and argued that the statute is nevertheless constitutional. Brief of Appellee in *Johnson* v. *State*, 292 Md. 405, 439 A.2d 542 (1982), at 8-9. (L. 236).

Notwithstanding the plain language of the statute and the conclusion of counsel on both sides, the Court of Appeals construed the statute to allocate the burden to the State. *Tichnell* v. *State*, 287 Md.

The circumstances presented here are similar to those considered in *Hitchcock* v. *Dugger, supra*. Hitchcock argued that at the time he was sentenced, the Florida death penalty statute had been interpreted by the Florida Supreme Court to prohibit the sentencing jury and judge from considering mitigating circumstances not specifically enumerated in the statute and that the sentencing judge assumed such a prohibition and instructed the jury accordingly. The State contended that the petitioner had misinterpreted the decision of the Florida Supreme Court and noted that the Court had subsequently interpreted the statute so as not to prohibit sentencers from considering mitigating circumstances not enumerated in the statute. This Court looked not to the interpretation given the statute by the Florida Supreme Court, but to "the sentencing proceedings actually conducted" in the case. Because the record showed "that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances," the proceedings did not comport with the requirement that the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence. 107 S.Ct. at 1824. *See also California* v. *Brown*, ___ U.S. ___, 107 S.Ct. 837, 841-42 (1987) (O'Connor, J., concurring) (Jury instructions, in combination with prosecutor's closing argument, may create a legitimate basis for ambiguity concerning the factors actually considered by the jury.)

695, 730, 415 A.2d 830 (1980); *Booth* v. *State*, 306 Md. 172, 225-226 n.14, 507 A.2d 1098 (1986), *vacated*, 107 S.Ct. 2529 (1987); *Foster* v. *State*, 304 Md. 439, 475, 499 A.2d 1236 (1985), *cert. denied*, 106 S.Ct. 3310 (1986); *Johnson* v. *State*, 292 Md. 405, 436, 439 A.2d 542 (1982). *See also Evans* v. *State*, 304 Md. 487, 536 and n.18, 499 A.2d 1261 (1985), *cert. denied*, 106 S.Ct. 3310 (1986).

A similar problem was also before the Court in *Andres* v. *United States*, 333 U.S. 740 (1948). The petitioner had been convicted of first degree murder and sentenced to death under a statute which provided for capital punishment in cases of murder in the first degree unless the jury qualified its verdict "without capital punishment." The issue was the impact of a non-unanimous jury decision upon whether the verdict should be so qualified. This Court refused to read the statute in question to require that a "unanimous jury alleviate its rigor" and concluded that the jury must unanimously find that the sentence of death should be imposed. This Court reversed the judgment because the jury instructions on the effect of non-unanimity could have been misleading.

> That reasonable men might derive a meaning from the instructions given other than the proper meaning of § 567 is probable. In death cases doubts such as those presented here should be resolved in favor of the accused. The context of § 567 does not defy accurate and precise expression.* * * *
>
> As we are of the opinion that the instructions given on this issue did not fully protect the petitioner, the judgment of the lower court is reversed and the case remanded for a new trial.

Id. at 752.

In *Hicks* v. *Oklahoma*, 447 U.S. 343 (1980), the petitioner was sentenced by a jury in accordance with an habitual offender statute later declared unconstitutional. When he sought to have his sentence set aside on appeal, his claim that the sentence was unconstitutional was rejected on the ground that he was not prejudiced because his sentence was within the range of punishment that could have been imposed. This Court reversed, finding that Hicks had been denied due process of law.

By statute in Oklahoma, a convicted defendant is entitled to have his punishment fixed by the jury ***. Had the members of the jury been correctly instructed in this case, they could have imposed any sentence of "not less than ten . . . years." *** The possibility that the jury would have returned a sentence of less than 40 years is thus substantial. It is, therefore, wholly incorrect to say that the petitioner could not have been prejudiced by the instruction requiring the jury to impose a 40-year prison sentence.

It is argued that all that is involved in this case is the denial of a procedural right of exclusively state concern. Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of State procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, *** and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.

Id. at 345-46. (Citations omitted.) As in the preceding cases, the trial judge's failure to properly instruct the jury as to the exercise of its statutory discretion denied Petitioner due process of law.[11]

---

[11] To the extent that the holding of the Court of Appeals involves a reconstruction of the statute, that reconstruction does not eliminate the unconstitutionality of Petitioner's sentence. "[W]here an accused is tried under a broad construction of an Act which would make it unconstitutional, the conviction cannot be sustained on appeal by a limiting construction which eliminates the unconstitutional features of the Act . . . ." *Ashton* v. *Kentucky*, 384 U.S. 195, 198 (1966). The same principle applies to sentencing statutes. *Hicks*, *supra*, at 346-47. Thus, Petitioner's sentence, which was imposed without adequate guidance, is invalid. *Hicks*, *supra*. *See Bouie* v. *City of Columbia*, 378 U.S. 347, 353 (1964). Petitioner should have been afforded the benefit of the court's reconstruction. *Ivan V.* v. *City of New York*, 407 U.S. 203, 205 (1972).

A separate due process problem follows from the fact that the defense could not reasonably have anticipated that the statute would be interpreted as it was by the Court of Appeals. Thus, it would be unreasonable to expect the defense to request that the jury be instructed that non-unanimous mitigating circumstances were to be considered. As the defense was not given fair warning of the meaning of the statute, Petitioner was deprived of due process of law. *See Bouie* v. *City of Columbia*, 378 U.S. at 353.

III. PETITIONER'S SENTENCE OF DEATH WAS TAINTED BY THE ADMISSION OF VICTIM IMPACT EVIDENCE.

In *Booth* v. *Maryland*, 482 U.S. ___, 107 S.Ct. 2529, 2533 (1987), this Court held that victim impact evidence is "irrelevant to a capital sentencing decision, and that its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." The Court of Appeals in this case held that evidence adduced at the sentencing hearing describing the personal qualities of the victim was not victim impact evidence and, therefore, not inadmissible under *Booth*.

> In light of the Supreme Court's recent decision in *Booth* v. *Maryland*, ___ U.S. ___, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), we note that in the instant case, no "Victim Impact Statement" was introduced in evidence or even proffered. There was attached to the Division of Parole and Probation's investigation report a memorandum from Jane Christy of the victim/witness assistance program to the State's attorney, summarizing an interview with the victim's brother and sister-in-law. This memorandum was

admitted into evidence after Mill's counsel expressly informed the Court that he had read it and did not object to its admission. The memorandum stated in its entirety as follows:

> "Paul was a hyperactive child and hard to handle which resulted in a lot of beatings from his various guardians. He ran away constantly from the various homes in which he had been placed. After a while Paul, at the age of 15, just started living on the streets. He was eventually sent to the Maryland Training School for boys. Paul never really had a home or a family as such. 'I (Thomas Brown) tried to keep in touch with Paul by writing and visiting him whenever possible. I always had good homes and a good life and always felt so guilty that there was nothing I could do to help Paul. After all, I was only one year older than he.'
>
> "'Paul was a good person who had a tough life, a lot of bad breaks, no family, no home, nobody to really give him a chance. I sometimes think he felt more secure in prison, because he had no one on the outside. Sure, he committed crimes, but he wasn't violent. He did what he had to do to survive and he got involved with a lot of bad people."

This memorandum did not purport to be and did not fall within the statutory requirements of a victim impact statement. *See* Code (1957, 1986 Repl. Vol.), Art. 41, § 4-609(c). The memorandum did not describe the impact of the crime on the victim's family or the "family members' opinion and characterizations" of the crime and the defendant. *Booth* v. *Maryland, supra*. As defense counsel recognized at the sentencing proceeding in this case, the content of this statement would not inflame a jury or otherwise prejudice Mills. Consequently, the memorandum did not constitute the "victim impact evidence" found constitutionally inadmissible in *Booth* v. *Maryland, supra*.

(J.A. 146-147 n.14).[12]

The difficulty with the court's holding is that the court fails to mention that a third type of evidence was held inadmissible in *Booth:* evidence about the "personal characteristics of the victims." 107 S.Ct. at 2533.

> The focus of a VIS, however, is not on the defendant, but on the *character and reputation of the victim* and the effect on his family. These circumstances may be wholly unrelated to the blameworthiness of a particular defendant.
>
> * * *
>
> Nor is there any justification for permitting such a decision to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character. This type of information does not provide a "principled way to distinguish [cases] in which the death penalty was imposed, from the many cases in which it was not."
>
> We also note that it would be difficult—if not impossible—to provide a fair opportunity to rebut such evidence without shifting the focus of the sentencing hearing away from the defendant. A threshold problem is that victim impact information is not easily susceptible to rebuttal. Presumably the defendant would have the right to cross-examine the declarants, but he rarely would be able to show that the family members have exaggerated the degree of sleeplessness, depression or emotional trauma suffered. Moreover, if the state is permitted to introduce evidence of the victim's personal qualities, it cannot

---

[12] The prejudicial effect of this evidence was exacerbated by the prosecutor's argument. The prosecutor referred to the "surviving relatives" (J.A. 11); to "how Paul Brown's brother feels now that his brother is dead" (J.A. 12), and to "the surviving relatives of Paul Brown." (J.A. 85.)

> be doubted that the defendant also must be given the chance to rebut this evidence. Putting aside the strategic risks of attacking the victim's character before the jury, in appropriate cases the defendant presumably would be permitted to put on evidence that the victim was of dubious moral character, was unpopular, or was ostracized from his family. The prospect of a "mini-trial" on the victim's character is more than simply unappealing; it could well distract the sentencing jury from its constitutionally required task—determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime. We thus reject the contention that the presence or absence of emotional distress of the victim's family, *or the victim's personal characteristics*, are proper sentencing considerations in a capital case.

Id. at 2534-35. (Citations and footnotes omitted). The Court further noted,

> We are troubled by the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. Of course, our system of justice does not tolerate such distinctions. Cf. *Furnam* v. *Georgia*, 408 U.S. 238, 242, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972) (Douglas, J., concurring).

Id. at 2534 n.8.

There is, therefore, no basis for the conclusion of the Court of Appeals that only evidence describing the impact of the crime on family members and evidence of their opinions and characterizations of the crime and the defendant are inadmissible under *Booth* while evidence of the victim's personal qualities is permitted. Under *Booth*, reversal is required.[13]

---

[13] Although this issue was not raised at trial, nor, consequently, on appeal, it was addressed by the Court of Appeals. It is thus properly before this Court on certiorari. *Burch* v. *Louisiana*, 441 U.S. 130, 133 n.5 (1979).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the judgment of the court below.

Respectfully submitted,

ALAN H. MURRELL
Public Defender of Maryland
GEORGE E. BURNS, JR.*
Assistant Public Defender
Appellate Division, 6th Flr.
201 St. Paul Place
Baltimore, Maryland 21202
(301) 333-4842
MICHAEL R. BRAUDES
Assistant Public Defender
JULIA DOYLE BERNHARDT
Assistant Public Defender
MARK COLVIN
Assistant Public Defender
JOSE' FELIPE' ANDERSON
Assistant Public Defender
Counsel for Petitioner
**Counsel of Record*

APPENDIX

TABLE OF CONTENTS

	Page
CONSTITUTION OF THE UNITED STATES	
Amendment VIII	1a
Amendment XIV, Section I	1a
MD. CODE (1957, 1982 REPL. VOL.)	
Art. 27, § 412	1a
Art. 27, § 413	2a
Art. 27, § 414	9a
Art. 41, § 4-609	11a
MARYLAND RULES OF PROCEDURE	
Former Maryland Rule 4-343	13a
Maryland Rule 4-343, as amended	21a

APPENDIX

PERTINENT CONSTITUTIONAL PROVISIONS

Constitution of the United States

Amendment VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PERTINENT STATUTES

Maryland Code (1957, 1982 Repl. Vol.) Art. 27, § 412:

(a) *Designation of degree by court or jury.*—If a person is found guilty of murder, the court or jury that determined the person's guilt shall state in the verdict whether the person is guilty of murder in the first degree or murder in the second degree.

(b) *Penalty for first degree murder.*—Except as provided under subsection (f) of this section, a person found guilty of murder in the first degree shall be sentenced to death, imprisonment for life, or imprisonment for life without the possibility of parole. The sentence shall be imprisonment for life unless: (1)(i) the State notified the person in writing at least 30 days prior to trial that it intended to seek a sentence of death, and advised the person of each aggravating circumstance upon which it intended to rely, and (ii) a sentence of death is imposed in accordance with § 413; or (2) the State notified the person

in writing at least 30 days prior to trial that it intended to seek a sentence of imprisonment for life without the possibility of parole under § 412 or § 413 of this article.[1]

(c) *Penalty for second degree murder.*—A person found guilty of murder in the second degree shall be sentenced to imprisonment for not more than 30 years.

(d) *Court to determine possibility of parole.*—Except as provided by § 413 of this article, the court shall decide whether to impose a sentence of life imprisonment or life imprisonment without the possibility of parole.

(3) *"Imprisonment for life without the possibility of parole" defined.*—In this section, "imprisonment for life without the possibility of parole" means imprisonment for the natural life of an inmate under the custody of a correctional institution, including the Patuxent Institution.

(f) *Life imprisonment for defendants less than 18 years old.*—If a person found guilty of murder in the first degree was less than 18 years old at the time the murder was committed, the person shall be sentenced to imprisonment for life and may not be sentenced to death. (1978, ch. 3, §§ 1,2; 1987, chs. 164, 237, 626.)

Maryland Code (1957, 1982 Repl. Vol.) Art. 27, § 413:

(a) *Separate sentencing proceeding required.*—If a person is found guilty of murder in the first degree, and if the State had given the notice required under Sec. 412(b), a separate sentencing proceeding shall be conducted as soon as practicable after the trial has been completed to determine whether he shall be sentenced to death.

(b) *Before whom proceeding conducted.*—This proceeding shall be conducted:

(1) Before the jury that determined the defendant's guilt; or

(2) Before a jury impaneled for the purpose of the proceeding if:

---

[1] The provisions relating to a sentence of life without parole became effective subsequent to Petitioner's sentencing.

(i) The defendant was convicted upon a plea of guilty;

(ii) The defendant was convicted after a trial before the court sitting without a jury;

(iii) The defendant was convicted after a trial before the court sitting without a jury;

(iv) Review of the original sentence of death by a court of competent jurisdiction has resulted in a remand for resentencing; or

(3) Before the court alone, if a jury sentencing proceeding is waived by the defendant.

(c) *Evidence; argument; instructions.*—(1) The following type of evidence is admissible in this proceeding:

(i) Evidence relating to any mitigating circumstance listed in subsection (g) of this section;

(ii) Evidence relating to any aggravating circumstance listed in subsection (d) of this section of which the State had notified the defendant pursuant to Section 412(b) of this article;

(iii) Evidence of any prior criminal convictions, pleas of guilty or nolo contendere, or the absence of such prior convictions or pleas, to the same extent admissible in other sentencing procedures;

(iv) Any presentence investigation report. However, any recommendation as to sentence contained in the report is not admissible; and

(v) Any other evidence that the court deems of probative value and relevant to sentence, provided the defendant is accorded a fair opportunity to rebut any statements.

(2) The State and the defendant or his counsel may present argument for or against the sentence of death.

(3) After presentation of the evidence in a proceeding before a jury, in addition to any other appropriate instructions permitted by law, the court shall instruct the jury as to the findings it must make in order to determine whether the sentence shall be death, imprisonment for life without

the possibility of parole, or imprisonment for life, and the burden of proof applicable to these findings in accordance with subsection (f) or subsection of (h) of this section.

(d) *Consideration of aggravating circumstances.*—In determining the sentence, the court or jury, as the case may be, shall first consider whether, beyond a reasonable doubt, any of the following aggravating circumstances exist:

(1) The victim was a law enforcement officer who was murdered while in the performance of his duties.

(2) The defendant committed the murder at a time when he was confined in any correctional institution.

(3) The defendant committed the murder in furtherance of an escape or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.

(4) The victim was taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.

(5) The victim was a child abducted in violation of § 2 of this article.

(6) The defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder.

(7) The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

(8) At the time of the murder, the defendant was under sentence of death or imprisonment for life.

(9) The defendant committed more than one offense or murder in the first degree arising out of the same incident.

(10) The defendant committed the murder while committing or attempting to commit a robbery, arson, rape, or sexual offense in the first degree.

(e) *Definitions.*—As used in this section, the following terms have the meanings indicated unless a contrary meaning is clearly intended from the context in which the term appears:

(1) The terms "defendant" and "person," except as those terms appear in subsection (d)(7), include only a principal in the first degree.

(2) The term "correctional institution" includes any institution for the detention or confinement of persons charged with or convicted of a crime, including Patuxent Institution, any institution for the detention or confinement of juveniles charged with or adjudicated as being delinquent, and any hospital in which the person was confined pursuant to an order of a court exercising criminal jurisdiction.

(3) (i) The term "law enforcement officer" has the meaning given in § 727 of Article 27.

(ii) The term "law enforcement officer," as used in subsection (d) of this section, includes:

1. An officer serving in a probationary status;

2. A parole and probation officer;

3. A law enforcement officer of a jurisdiction outside of Maryland; and

4. If the law enforcement officer is wearing the uniform worn by the law enforcement officer while acting in an official capacity or is prominently displaying his official badge or other insignia of office, a law enforcement officer privately employed as a security officer or special policeman under the provisions of Article 41, §§ 4-901 through 4-913 of the Code.

(4) "Imprisonment for life without the possibility of parole" means imprisonment for the natural life of an inmate under the custody of a correctional institution, including the Patuxent Institution.

(f) *Finding that no aggravating circumstances exist.*—If the court or jury does not find, beyond a reasonable doubt, that one or more of these aggravating circum-

stances exist, it shall state that conclusion in writing, and a sentence of death may not be imposed.

(g) *Consideration of mitigating circumstances.*—If the court or jury finds, beyond a reasonable doubt, that one or more of these aggravating circumstances exsit, it shall then consider whether, based upon a preponderance of the evidence, any of the following mitigating circumstances exist:

(1) The defendant has not previously (i) been found guilty of a crime of violence; (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) had a judgment of probation on stay of entry of judgment entered on a charge of a crime of violence. As used in this paragraph, "crime of violence" means abduction, arson, escape, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery, or rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.

(2) The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

(3) The defendant acted under substantial duress, domination or provacation of another person, but not so substantial as to constitute a complete defense to the prosecution.

(4) The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder or emotional disturbance.

(5) The youthful age of the defendant at the time of the crime.

(6) The act of the defendant was not the sole proximate cause of the victim's death.

(7) It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

(8) Any other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case.

(h) *Weighing mitigating and aggravating circumstances.*—(1) If the court or jury finds that one or more of these mitigating circumstances exist, it shall determine whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances.

(2) If it finds that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death.

(3) If it finds that the mitigating circumstances outweigh the aggravating circumstances, a sentence of death may not be imposed.

(i) *Determination to be written and unanaimous.*—The determination of the court or jury shall be in writing, and, if a jury, shall be unanimous and shall be signed by the foreman.

(j) *Statements required in determination.*—The determination of the court or jury shall state, specifically:

(1) Which, if any, aggravating circumstances it finds to exist;

(2) Which, if any, mitigating circumstances it finds to exist;

(3) Whether any mitigating circumstances found under subsection (g) outweigh the aggravating circumstances found under subsection (d);

(4) Whether the aggravating circumstances found under subsection (d) are not outweighed by mitigating circumstances under subsection (g); and

(5) The sentence, determined in accordance with subsection (f) or (h).

(k) *Imposition of sentence.*—(1) If the jury determines that a sentence of death shall be imposed under the provisions of this section, then the court shall impose a sentence of death.

(2) If the jury, within a reasonable time, is not able to agree as to whether a sentence of death shall be imposed, the court may not impose a sentence of death.

(3) If the sentencing proceeding is conducted before a court without a jury, the court shall determine whether a sentence of death shall be imposed under the provisions of this section.

(4) If the court or jury determines that a sentence of death may not be imposed, and the State did not give the notice required under § 412(b) of this article of intention to seek a sentence of life imprisonment without the possibility of parole, the court shall impose a sentence of life imprisonment.

(5) If the State gives the notice required under § 412(b) of this article of intention to seek a sentence of imprisonment for life without the possisbility of parole but does not give notice of intention to seek the death penalty, the court shall conduct a separate sentencing proceeding as soon as practicable after the trial has been completed to determine whether to impose a sentence of imprisonment for life or imprisonment for life without the possibility of parole.

(6) If the State gives the notice required under § 412(b) of this article of intention to seek the death penalty in addition to the notice of intention to seek a sentence of imprisonment for life without the possibility of parole, and the court or jury determines that a sentence of death may not be imposed under the provisions of this section, that the court or jury shall determine whether to impose a sentence of imprisonment for life or imprisonment for life without the possibility of parole.

(7)(i) In determining whether to impose a sentence of imprisonment for life without the possibility of parole, a jury shall agree unanimously on the imposition of a sentence of imprisonment for life without the possibility of parole.

(ii) If the jury agrees unanimously to impose a sentence of imprisonment for life without the possibility of parole, the court shall impose a sentence of imprisonment for life without the possibility of parole.

(iii) If the jury, within a reasonable time, is not able to agree unanimously on the imposition of a sentence of imprisonment for life without the possibility of parole, the court shall dismiss the jury and impose a sentence of imprisonment for life.

(l) *Rules of procedure.*—The Court of Appeals may adopt rules of procedure to govern the conduct of a sentencing proceeding conducted pursuant to this section, including any forms to be used by the court or jury in making its written findings and determinations of sentence.

(m) *Alternate jurors.*—(1) A judge shall appoint at least 2 alternate jurors when impaneling a jury for any proceeding:

(i) In which the defendant is being tried for a crime for which the death penalty may be imposed; or

(ii) Which is held under the provisions of this section.

(2) The alternate jurors shall be retained during the length of the proceedings under such restrictions and regulations as the judge may impose.

(3)(i) If any juor dies, becomes incapacitated, or disqualified, or is discharged for any other reason before the jury begins its deliberations on sentencing, an alternate juror becomes a juror in the order in which selected, and serves in all respects as those selected on the regular trial panel.

(ii) An alternate juror may not replace a juror who is discharged during the actual deliberations of the jury on the guilt or innocence of the defendant, or on the issue of sentencing. (1978, ch. 3 §§ 1, 2; 1979, ch. 521; 1983, chs. 8. 296, 497; 1984, chs. 255, 652; 1987, chs, 237, 600.)

Art. 27, § 414:

(a) *Review by Court of Appeals required.*—Whenever the death penalty is imposed, and the judgment becomes final, the Court of Appeals shall review the sentence on the record.

(b) *Transmission of papers to Court of Appeals.*—The clerk of the trial court shall transmit to the Clerk of

the Court of Appeals the entire record and transcript of the sentencing proceeding within ten days after receipt of the transcript by the trial court. The clerk also shall transmit the written findings and determination of the court or jury and a report prepared by the trial court. The report shall be in the form of a standard questionnaire prepared and supplied by the Court of Appeals of Maryland and shall include a recommendation by the trial court as to whether or nor imposition of the sentence of death is justified in the case.

(c) *Briefs and oral argument.*—Both the State and the defendant may submit briefs and present oral argument within the time provided by the Court.

(d) *Consolidation of appeals.*—Any appeal from the verdict shall be consolidated in the Court of Appeals with the review of sentence.

(e) *Considerations by Court of Appeals.*—In addition to the consideration of any errors properly before the Court on appeal, the Court of Appeals shall consider the imposition of the death sentence. With regard to the sentence, the Court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) Whether the evidence supports the jury's or court's finding of a statutory aggravating circumstance under § 413(d);

(3) Whether the evidence supports the jury's or court's finding that the aggravating circumstances are not outweighed by mitigating circumstances; and

(4) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(f) *Decision of Court of Appeals.*—(1) In addition to its review pursuant to any direct appeal, with regard to the death sentence, the Court shall:

(i) Affirm the sentence;

(ii) Set aside the sentence and remand the case for the conduct of a new sentencing proceeding under § 413; or

(iii) Set aside the sentence and remand for modification of the sentence to imprisonment for life.

(2) The Court shall include in its decision a reference to the similar cases which it considered.

(g) *Rules of procedure.*—The Court may adopt rules of procedure to provide for the expedited review of all death sentences pursuant to this section. (1978, ch. 3, §§ 1, 2.)

Art. 41, § 4-609(c) (in pertinent part):

(2)(i) The presentence investigation shall include a victim impact statement, if:

1. The defendant, in committing a felony, caused physical, psychological, or economic injury to the victim; or

2. The defendant, in committing a misdemeanor, caused serious physical injury or death to the victim.

(ii) If the court does not order a presentence investigation, the State's Attorney may prepare a victim impact statement to be submitted to the court and the defendant in accordance with the Maryland Rules of Procedure pertaining to presentence investigations.

(iii) The court shall consider the victim impact statement in determining the appropriate sentence, and in entering any order of restitution to the victim under Article 27, § 640(c) of the Code.

(3) A victim impact statement shall:

(i) Identify the victim of the offense;

(ii) Itemize any economic loss suffered by the victim as a result of the offense;

(iii) Identify any physical injury suffered by the victim as a result of the offense along with its seriousness and permanence;

(iv) Describe any change in the victim's personal welfare or familial relationships as a result of the offense;

(v) Identify any request for psychological services initiated by the victim or the victim's family as a result of the offense; and

(vi) Contain any other information related to the impact of the offense upon the victim or the victim's family that the court requires.

(4) If the victim is deceased, under a mental, physical, or legal disability, or otherwise unable to provide the information required under this section, the information may be obtained from the personal representative, guardian, or committee, or such family members as may be necessary.

(d) In any case in which the death penalty is requested under Article 27, § 412, a presentence investigation, including a victim impact statement, shall be completed by the Division of Parole and Probation, and shall be considered by the court or jury before whom the separate sentencing proceeding is conducted under Article 27, § 413. (An Code, 1951, § 103; 1939, § 86; 1939, ch. 406, § 55C; 1953, ch. 625, § 1; 1967, ch. 527; 1968, ch. 457, § 1; 1972, ch. 181, § 41; ch. 532; 1973, ch. 456; 1976, ch. 118; 1981, ch. 300; 1982, chs. 33, 494; ch. 820, § 1; 1983, chs. 297, 345; 1986, ch. 5, § 4.)

PERTINENT RULES OF PROCEDURE

Maryland Rules of Procedure, Former Rule 4-343:[2]

Rule 4-343. SENTENCING—PROCEDURE IN CAPITAL CASES

(a) **Applicability.**—This Rule applies whenever sentence is imposed under Code, Article 27, Sec. 413.

(b) **Statutory Sentencing Procedure.**—When a defendant has been found guilty of murder in the first degree and the State has given the notice required under Code, Article 27, Sec. 412(b), a separate sentencing proceeding shall be conducted as soon as practicable after the trial pursuant to the provisions of Code, Article 27, § 413.

(c) **Judge.**—Except as provided in Rule 4-361, the judge who presides at trial shall preside at the sentencing proceeding.

(d) **Allocution.**—Before sentence is determined, the court shall afford the defendant the opportunity, personally and through counsel, to make a statement.

(e) **Written Findings and Determinations.**—The findings and determinations shall be made in writing in the following form:

---

[2] This Appendix contains the Rule as it read prior to the decision of the Court of Appeals in this case, and the Rule as amended subsequent to that decision.

(CAPTION)

FINDINGS AND SENTENCING DETERMINATION

Section I

Based upon the evidence, we unanimously find that each of the following aggravating circumstances that is marked "yes" has been proven BEYOND A REASONABLE DOUBT. Each of the aggravating circumstances that has not been so proven is marked "no."

1. The victim was a law enforcement officer who was murdered while in the performance of the officer's duties.
☐ Yes ☐ No

2. The defendant committed the murder at a time when confined in a correctional institution.
☐ Yes ☐ No

3. The defendant committed the murder in furtherance of an escape from or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.
☐ Yes ☐ No

4. The victim was taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.
☐ Yes ☐ No

5. The victim was a child abducted in violation of Code, Article 27, Sec. 2.
☐ Yes ☐ No

6. The defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder.
☐ Yes ☐ No

7. The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or

the promise of remuneration.
☐ Yes ☐ No

8. At the time of the murder, the defendant was under the sentence of death or imprisonment for life.
☐ Yes ☐ No

9. The defendant committed more than one offense of murder in the first degree arising out of the same incident.
☐ Yes ☐ No

10. The defendant committed the murder while committing or attempting to commit robbery, arson, rape in the first degree, or sexual offense in the first degree.
☐ Yes ☐ No

(If one or more of the above are marked "yes," complete Section II. If all of the above are marked "no," do not complete sections II and III.)

Section II

Based upon the evidence, we unanimously find that each of the following mitigating circumstances that is marked "yes" has been proven to exist by A PREPONDERANCE OF THE EVIDENCE. Each mitigating circumstances that has no been so proved is marked "no."

1. As used in this paragraph, "crime of violence" means abduction, arson, escape, kidnapping, mayhem, murder, robbery, rape in the first or second degree, sexual offense in the first or second degree, manslaughter other than involuntary manslaughter, an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.

The defendant previously (i) has not been found guilty of a crime of violence; and (ii) has not entered a plea of guilty or nolo contendere to a charge of a crime of violence; and (iii) has not been granted probation on stay of entry of judgment pursuant to a charge of crime of violence.
☐ Yes ☐ No

2. The victim was a participant in the defendant's conduct or consented to the act which caused the victim's

death.

☐ Yes ☐ No

3. The defendant acted under substantial duress, domination, or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution.

☐ Yes ☐ No

4. The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, or emotional disturbance.

☐ Yes ☐ No

5. The defendant was of a youthful age at the time of the crime.

☐ Yes ☐ No

6. The act of the defendant was not the sole proximate cause of the victim's death.

☐ Yes ☐ No

7. It is unlikely that the defense will engage in further criminal activity that would constitute a continuing threat to society.

☐ Yes ☐ No

8. Other facts specifically set forth below constitute migitaging circumstances:

☐ Yes ☐ No

_____

_____

_____

_____

(Use reverse side if necessary)

(If one or more of the above Section II have been marked "yes," complete Section III. If all of the above Section II are marked "no," do not complete Section III.)

Section

Based on the evidence, we unanimously find that it has been proven by A PREPONDERANCE OF THE EVI-

DENCE that the mitigating circumstances marked "yes" in Section II outweigh the aggravating circumstances marked "yes" in Section I.

☐ Yes ☐ No

DETERMINATION OF SENTENCE

Enter the determination of sentence either "Life Imprisonment" or "Death" according to the following instructions:

1. If all of the answers in Section I are marked "no," enter "Life Imprisonment."

2. If Section III was completed and was marked "yes," enter "Life Imprisonment."

3. If Section II was completed and all of the answers were marked "no," then enter "Death."

4. If Section III was completed and was marked "no," enter "Death." We unanimously determine the sentence to be _____

_____	_____
Foreman	Juror 7
_____	_____
Juror 2	Juror 8
_____	_____
Juror 3	Juror 9
_____	_____
Juror 4	Juror 10
_____	_____
Juror 5	Juror 11
_____	_____
Juror 6	Juror 12

or _____
JUDGE

(f) **Advice of the Judge.**—At the time of imposing sentence, the judge shall advise the defendant of the right of appeal and the time allowed for the exercise of this right. The judge shall also advise a defendant who receives a sentence of death that (1) the sentence only will be

reviewed automatically by the Court of Appeals, and (2) the sentence will be stayed pending review of the sentence by the Court of Appeals and any appeal which the defendant may take.

(g) **Report of Judge.**—After sentence is imposed, the judge promptly shall prepare and send to the parties a report in the following form:

CAPTION

REPORT OF TRIAL JUDGE

I. Data Concerning Defendant

A. Date of Birth
B. Sex
C. Race
D. Address
E. Length of Time in Community
F. Reputation in Community
G. Family Situation and Background
1. Situation at time of offense (describe defendant's living situation including marital status and number and age of children)
2. Family history (describe family history including pertinent data about parents and siblings)
H. Education
I. Work Record
J. Prior Criminal Record and Institutional History (list any prior convictions, disposition, and periods of incarceration)
K. Military History
L. Pertinent Physical or Mental Characteristics or History
M. Other Significant Data About Defendant

II. Data Concerning Offense

A. Briefly describe facts of offense (include time, place, and manner of death; weapon, if any; other participants and nature of participation)
B. Was there any evidence that the defendant was under the influence of alcohol or drugs at the time of the offense? If so describe.

C. Did the defendant know the victim prior to the offense?
Yes ☐ No ☐
1. If so, describe relationship.
2. Did the prior relationship in any way precipitate the offense? If so, explain.
D. Did the victim's behavior in any way provoke the offense? If so, explain.
E. Data Concerning Victim
1. Name
2. Date of Birth
3. Sex
4. Race
5. Length of time in community
6. Reputation in community
F. Any Other Significant Data About Offense

III. A. Plea Entered by Defendant:
Not guilty ☐; guilty ☐;
not guilty by reason of insanity ☐
B. Mode of Trial:
Court ☐ Jury ☐
If there was a jury trial, did defendant challenge the jury selection or composition? If so, explain.
C. Counsel
1. Name
2. Address
3. Appointed or retained
(If more than one attorney represented defendant, provide data on each and include stage of proceeding at which the representation was furnished.)
D. Pre-Trial Publicity—Did defendant request a mistrial or a change of venue on the basis of publicity? If so, explain. Attach copies of any motions made and exhibits filed.
E. Was defendant charged with other offenses arising out of the same incident? If so, list charges; state whether they were tried at same proceeding, and give disposition.

IV. Data Concerning Sentencing Proceeding

A. List aggravating circumstance(s) upon which State relied in the pre-trial notice.

B. Was the proceeding conducted
before same judge as trial? _____
before same jury? _____
If the sentencing proceeding was conducted before a jury other than the trial jury, did the defendant challenge the selection or composition of the jury? If so, explain.

C. Counsel—If counsel at sentencing was different from trial counsel, give information requested in III C above.

D. Which aggravating and mitigating circumstances were raised by the evidence?

E. On which aggravating and mitigating circumstances were the jury instructed?

F. Sentence imposed: Life Imprisonment
Death

V. Chronology
Date of Offense
Arrest
Charge
Notification of intention to seek penalty of death
Trial (guilt/innocence)—began and ended
Post-trial Motions Disposed Of
Sentencing Proceeding—began and ended
Sentence Imposed

VI. Recommendation of Trial Court As To Whether Imposition of Sentence of Death is Justified.

VII. A copy of the Findings and Sentencing Determination made in this action is attached to and made a part of this report.

_____
Judge

CERTIFICATION

I certify that on the _____ day of _____, 19____ I sent copies of this report to counsel for the parties for comment and have attached any comments made by them to this report.

_____
Judge

Within five days after receipt of the report, the parties may submit to the judge written comments concerning the factual accuracy of the report. The judge promptly shall file with the clerk of the trial court, and in the case of a life sentence with the Clerk of the Court of Appeals the report in final form, noting any changes made, together with any comments of the parties.

Rule 4-343, As Amended Subsequent To The Decision Of The Court Of Appeals In This Case.

RULE 4-343. SENTENCING—PROCEDURE IN CAPITAL CASES

(a) **Applicability.**—This Rule applies whenever a sentence of death is sought under Code, Article 27, § 413.

(b) **Statutory Sentencing Procedure.**—When a defendent has been found guilty of murder in the first degree, the State has given the notice required under Code, Article 27, § 412(b)(1), and the defendant may be subject to a sentence of death, a separate sentencing proceeding shall be conducted as soon as practicable after the trial pursuant to the provisions of Code, Article, 27, § 413.

(e) **Form of Written Findings and Determinations.**—Except as otherwise provided in section (f) of this Rule, the findings and determinations shall be made in writing in the following form:

(CAPTION)

FINDINGS AND SENTENCING DETERMINATION

Section I

Based upon the evidence, we unanimously find that each of the following statements marked "proven" has been proved BEYOND A REASONABLE DOUBT and that each of those statements marked "not proven" has not been proven BEYOND A REASONABLE DOUBT.

1. The defendant was a principal in the first degree to the murder.

proven ☐ not proven ☐

2. The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

proven ☐ not proven ☐

(If one or both of the above are marked "proven," complete Section II. If both are marked "not proven," proceed to Section V and enter "Life Imprisonment.")

Section II

Based upon the evidence, we unanimously find that each of the following aggravating circumstances that is marked "proven" has been proved BEYOND A REASONABLE DOUBT and we unanimously find that each of the aggravating circumstances marked "not proven" has not been proven BEYOND A REASONABLE DOUBT.

1. The victim was a law enforcement officer who was murdered while in the performance of the officer's duties.

proven ☐ not proven ☐

2. The defendant committed the murder at a time when confined in a correctional institution.

proven ☐ not proven ☐

3. The defendant committed the murder in furtherance of an escape from or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.

proven ☐ not proven ☐

4. The victim was taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.

proven ☐ not proven ☐

5. The victim was a child abducted in violation of Code, Article 27, § 2.

proven ☐ not proven ☐

6. The defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder.

proven ☐ not proven ☐

7. The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

proven ☐ not proven ☐

8. At the time of the murder, the defendant was under the sentence of death or imprisonment for life.

proven ☐ not proven ☐

9. The defendant committed more than one offense of murder in the first degree arising out of the same incident.

proven ☐ not proven ☐

10. The defendant committed the murder while committing or attempting to commit robbery, arson, rape in the first degree, or sexual offense in the first degree.

proven ☐ not proven ☐

(If one or more of the above are marked "proven," complete Section III. If all of the above are marked "not proven," do not complete Sections III and IV and proceed to Section V and enter "Life Imprisonment.")

Section III

Based upon the evidence, we make the following determinations as to mitigating circumstances:

1. The defendant has not previously (i) been found guilty of a crime of violence; or (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) been granted probation on stay of entry of judgment pursuant to a charge of a crime of violence.

(As used in the preceeding paragraph, "crime of violence" means abduction, arson, escape, kidnapping, mayhem,

murder, robbery, rape in the first or second degree, sexual offense in the first or second degree, manslaughter other than involuntary manslaughter, an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.)

(Mark only one.)

- ☐ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.
- ☐ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.
- ☐ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

2. The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

(Mark only one.)

- ☐ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.
- ☐ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.
- ☐ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

3. The defendant acted under substantial duress, domination, or provocation of another person, even though not so substantial as to constitute a complete defense to the prosecution.

(Mark only one.)

- ☐ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.
- ☐ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

- ☐ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

4. The murder was committed while the capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, or emotional disturbance.

(Mark only one.)

- ☐ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.
- ☐ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.
- ☐ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

5. The defendant was of a youthful age at the time of the crime.

(Mark only one.)

- ☐ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.
- ☐ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.
- ☐ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

6. The act of the defendant was not the sole proximate cause of the victim's death.

(Mark only one.)

- ☐ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

☐ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

☐ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

7. It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

(Mark only one.)

☐ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

☐ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

☐ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

☐ 8. (a) We unanimously find by a preponderance of the evidence that the following additional mitigating circumstances exist:

_____

_____

_____

_____

(Use reverse side if necessary)

☐ (b) One or more of us, but fewer than all 12, find by a preponderance of the evidence that the following additional mitigating circumstances exist:

_____

_____

_____

_____

(Use reverse side if necessary)

(If the jury unanimously determines in Section III that no

mitigating circumstances exist, do not complete Section IV. Proceed to Section V and enter "Death". If the jury or any juror determines that one or more mitigating circumstances exist, complete Section IV.)

Section IV

Each individual juror shall weigh the aggravating circumstances found unanimously to exist against any mitigating circumstances found unanimously to exist, as well as against any mitigating circumstances found by that individual juror to exist.

We unanimously find that the State has proved by A PREPONDERANCE OF THE EVIDENCE that the aggravating circumstances marked "proven" in Section II outweigh the mitigating circumstances in Section III.

☐ Yes ☐ No

Section V

Enter the determination of sentence either "Life Imprisonment" or "Death" according to the following instructions:

1. If both of the answers in Section I are marked "not proven," enter "Life Imprisonment."

2. If all of the answers in Section II are marked "not proven," enter "Life Imprisonment."

3. If Section III was completed and the jury unanimously determined that no mitigating circumstance exists, enter "Death."

4. If Section IV was completed and was marked "no," enter "Life Imprisonment."

5. If Section IV was completed and was marked "yes," enter "Death."

We unanimously determine the sentence to be _____

Section VI

If "Life Imprisonment" is entered in Section V, answer the following question:

Based upon the evidence, does the jury unanimously determine that the sentence of life imprisonment previously entered shall be without the possibility of parole?

☐ Yes ☐ No

Foreman	Juror 7
Juror 2	Juror 8
Juror 3	Juror 9
Juror 4	Juror 10
Juror 5	Juror 11
Juror 6	Juror 12

or _____
JUDGE

(f) **Deletions from Form.**—Unless the defendant requests otherwise, Section II of the form set forth in section (e) of this Rule shall not include any aggravating circumstance that the State has not specified in the notice required under Code, Article 27, § (b)(1) of its intention to seek a sentence of death. Section VI of the form shall not be submitted to the jury unless the State has given the notice required under Code, Article 27, § 412(b)(2) of its intention to seek a sentence of imprisonment for life without the possibility of parole.

(g) **Advice of the Judge.**—At the time of imposing sentence, the judge shall advise the defendant of the right of appeal and the time allowed for the exercise of this right. The judge shall also advise a defendant who receives a sentence of death that (1) the sentence only will be reviewed automatically by the Court of Appeals, and (2) the sentence will be stayed

pending review of the sentence by the Court of Appeals and any appeal which the defendant may take.

(h) **Report of Judge.**—After sentence is imposed, the judge promptly shall prepare and send to the parties a report in the following form:

CAPTION

REPORT OF TRIAL JUDGE

I. Data Concerning Defendant

- A. Date of Birth
- B. Sex
- C. Race
- D. Address
- E. Length of Time in Community
- F. Reputation in Community
- G. Family Situation and Background
  1. Situation at time of offense (describe defendant's living situation including marital status and number and age of children)
  2. Family history (describe family history including pertinent data about parents and siblings)
- H. Education
- I. Work Record
- J. Prior Criminal Record and Institutional History (list any prior convictions, disposition, and periods of incarceration)
- K. Military History
- L. Pertinent Physical or Mental Characteristics or History
- M. Other Significant Data About Defendant

II. Data Concerning Offense

- A. Briefly describe facts of offense (include time, place, and manner of death; weapon, if any; other participants and nature of participation)
- B. Was there any evidence that the defendant was under the influence of alcohol or drugs at the time of the offense? If so describe.

C. Did the defendant know the victim prior to the offense?
Yes ☐ No ☐
1. If so, describe relationship.
2. Did the prior relationship in any way precipitate the offense? If so, explain.

D. Did the victim's behavior in any way provoke the offense? If so, explain.

E. Data Concerning Victim
1. Name
2. Date of Birth
3. Sex
4. Race
5. Length of time in community
6. Reputation in community

F. Any Other Significant Data About Offense

III. A. Plea Entered by Defendant:
Not guilty ☐; guilty ☐;
not criminally responsible ☐

B. Mode of Trial:
Court ☐ Jury ☐
If there was a jury trial, did defendant challenge the jury selection or composition? If so, explain.

C. Counsel
1. Name
2. Address
3. Appointed or retained
(If more than one attorney represented defendant, provide data on each and include stage of proceeding at which the representation was furnished.)

D. Pre-Trial Publicity—Did defendant request a mistrial or a change of venue on the basis of publicity? If so, explain. Attach copies of any motions made and exhibits filed.

E. Was defendant charged with other offenses arising out of the same incident? If so, list charges; state whether they were tried at same proceeding, and give disposition.

IV. Data Concerning Sentencing Proceeding

A. List aggravating circumstance(s) upon which State relied in the pre-trial notice.

B. Was the proceeding conducted
before same judge as trial? _____
before same jury? _____
If the sentencing proceeding was conducted before a jury other than the trial jury, did the defendant challenge the selection or composition of the jury? If so, explain.

C. Counsel—If counsel at sentencing was different from trial counsel, give information requested in III C above.

D. Which aggravating and mitigating circumstances were raised by the evidence?

E. On which aggravating and mitigating circumstances were the jury instructed?

F. Sentence imposed: Life Imprisonment
Death
Life imprisonment without the possibility of parole

V. Chronology
Date of Offense
Arrest
Charge
Notification of intention to seek penalty of death
Trial (guilt/innocence)—began and ended
Post-trial Motions Disposed Of
Sentencing Proceeding—began and ended
Sentence Imposed

VI. Recommendation of Trial Court As To Whether Imposition of Sentence of Death is Justified.

VII. A copy of the Findings and Sentencing Determination made in this action is attached to and made a part of this report.

_____
Judge

CERTIFICATION

I certify that on the _____ day of _____, 19____ I sent copies of this report to counsel for the parties for comment and have attached any comments made by them to this report.

Judge

Within five days after receipt of the report, the parties may submit to the judge written comments concerning the factual accuracy of the report. The judge promptly shall file with the clerk of the trial court, and in the case of a life sentence with the Clerk of the Court of Appeals the report in final form, noting any changes made, together with any comments of the parties. (Amended July 27, 1987, effective Aug. 17, 1987.)

FILED
FEB 17
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-5367

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RALPH MILLS,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF OF RESPONDENT

J. JOSEPH CURRAN, JR.,
Attorney General of Maryland,

CHARLES O. MONK, II,
Deputy Attorney General,

GARY E. BAIR,
Assistant Attorney General,

RICHARD B. ROSENBLATT,*
Assistant Attorney General,

The Munsey Building,
7 N. Calvert Street,
Baltimore, Maryland 21202,
(301) 576-6410,

Counsel for Respondent.

*Counsel of Record

The Daily Record Co., Baltimore, MD 21202

ISSUES PRESENTED

1. Whether the Maryland capital punishment statute as interpreted by the Maryland Court of Appeals permits full consideration of evidence presented in mitigation of sentence?

2. Whether the jury instructions in the instant case provided proper guidance for the consideration of the evidence presented in mitigation?

3. Whether the introduction at sentencing of evidence describing the background of the murder victim was consistent with the Eighth and Fourteenth Amendments to the United States Constitution?

TABLE OF CONTENTS

Page

Issues Presented. i

Statement of the Case 1

Summary of Argument 6

Argument:

I. The Maryland capital punishment statute as interpreted by the Maryland Court of Appeals permits full consideration of evidence presented in mitigation of sentence. 8

II. The jury instructions in Petitioner's case provided proper guidance for the consideration of the evidence presented in mitigation 23

III. The introduction at sentencing of evidence describing the background of the murder victim was consistent with the Eighth and Fourteenth Amendments to the United States Constitution. 31

Conclusion 39

TABLE OF CITATIONS

Cases

Andres v. United States,
333 U.S. 740 (1948) 26

Apodaca v. Oregon,
406 U.S. 404 (1972) 22

Booth v. Maryland,
107 S.Ct. 2529 (1987) ..... 8, passim

Eddings v. Oklahoma,
455 U.S. 104 (1982) ..... 17, passim

Gardner v. Florida,
430 U.S. 349 (1977) 33

Garner v. Louisiana,
368 U.S. 157 (1961) 21, 22

Henderson v. Kibbe,
431 U.S. 145 (1977) 24

Hitchcock v. Dugger,
107 S.Ct. 1821 (1987) 18, 34

Jurek v. Texas,
428 U.S. 262 (1976) 20

Lockett v. Ohio,
438 U.S. 586 (1978) ..... 9, passim

Lowenfield v. Phelps,
56 U.S.L.W. 4071
(U.S. Jan. 13, 1988) 28

Mills v. State, 310 Md. 33,
527 A.2d 3 (1987) ..... 23, passim

Mullaney v. Wilbur,
421 U.S. 684 (1975) 22

Roberts v. Louisiana,
428 U.S. 325 (1976) 8, 15, 16

Skipper v. South Carolina,
106 S.Ct. 1669 (1986) 18, 34

State v. Bell, 360 S.E.2d 706
(S.C. 1987) 36

State v. Kirkley, 308 N.C. 196,
302 S.E.2d 144 (1983) 20

Sumner v. Shuman,
107 S.Ct. 2716 (1987) 16

United States v. Perez,
22 U.S. (9 Wheat.) 579 (1824) 22

Woodson v. North Carolina,
428 U.S. 280 (1976) 8, 15, 16

Constitutional Provisions

United States Constitution:

Eighth Amendment 10, 31

Fourteenth Amendment 31

Statutes

Annotated Code of Maryland:

Article 27, §412 11

Article 27, §413 ..... 10, passim

Rules

Maryland Rule of Procedure,
Rule 4-343 ..... 12, 15, 29

No. 87-5367

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

RALPH MILLS,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Petitioner, Ralph Mills, was tried by a jury in the Circuit Court for Allegany County, Maryland, and convicted of first degree premeditated murder. The same jury sentenced Petitioner to death in a separate, subsequent proceeding. The Court of Appeals of

Maryland affirmed Petitioner's conviction and sentence. By order of December 7, 1987, this Court issued a writ of certiorari.

Evidence produced at trial showed that Petitioner shared a cell in the Maryland Correctional Institution in Hagerstown, Maryland, with Paul Robin Brown. Officers were called to the cell to investigate a disturbance and discovered Petitioner demanding to be released from the cell saying, "My cell buddy is dead." The cell door was opened and Petitioner emerged, carrying a blood covered shank at his side. Brown's body was found lying on his bunk, stabbed six times in the chest and 39 times in the back. Written on the wall of the cell in what appeared to be blood were the words, "Helter Skelter's son."

At the sentencing proceeding that followed Petitioner's conviction for premeditated murder in the first degree, the State introduced into evidence a pre-sentence investigation done for the case and a "victim impact statement." The victim impact statement

summarized the life history of the deceased. Defense counsel stated that he had no objection to the admission of either document (J.A. 14-15). The State also introduced Petitioner's prison records and testimony from the Division of Parole and Probation agent who had conducted interviews of Petitioner and his parents.

On Petitioner's behalf, his mother testified that he had a sixth grade education and began having problems at a young age (J.A. 45). His mother's first contact with a state agency concerning his behavior occurred when Petitioner was approximately 11 or 12 years old (J.A. 46). His conduct required his mother to go to his school every day (J.A. 46). He underwent therapy for several months (J.A. 47). At that time, he was diagnosed as having minimal brain damage and was placed on medication (J.A. 48).

Petitioner was ultimately placed in the German Children's Home (J.A. 49). His misbehavior commenced anew as a combined result of being taken

off the medication and having a lack of strict supervision. (J.A. 50-51). Petitioner stayed at the German Children's Home for approximately nine months with negative results (J.A. 51). However, his mother refused to take him home because she was afraid of what might happen (J.A. 52).

In May of 1980, Petitioner was placed in the Maryland Training School for Boys (J.A. 53). He ran away from the Training School (J.A. 54). He was heavily involved with drugs (J.A. 52, 54). Petitioner was discharged from the Training School over the objection of his mother (J.A. 57). According to his mother, going to court and being involved in the law was "a continuing thing" (J.A. 57).

Petitioner's parents were divorced when he was six or seven (J.A. 45). He had little contact with his natural father because most of the time "his father was either incarcerated or running as a fugitive from the law." (J.A. 55). Petitioner never accepted his stepfather as a father (Id.). With respect to Petitioner's intellectual ability, his mother stated that he "believes he's very smart, but . . . [he's] slow." (J.A. 55).

Petitioner elected not to testify and no further evidence was produced by the defense (J.A. 68). Following instructions to the jury, Petitioner was informed of his right to speak to the jury, unsworn; he declined that opportunity (J.A. 75).

The State then presented its closing argument, and argument on behalf of Petitioner followed. Defense counsel argued that Petitioner had a low I.Q. and a sixth grade education. He argued that Petitioner needed to be treated, not killed. With specific reference to the mitigating circumstances, counsel argued that the jury should find the explicit mitigating circumstances of "youth" (J.A. 90-91) and lack of "future dangerousness" (J.A. 91-92). Under the "other" mitigating circumstances, he urged the jury to find that the State failed to reform Petitioner despite the numerous opportunities to do so (J.A. 92-93).

Following deliberation, the jury found the existence of an aggravating circumstance (the defendant committed the murder at a time when he was confined in a correctional institution), but found no mitigating circumstance. A sentence of death was imposed.

SUMMARY OF ARGUMENT

I.

The Maryland capital punishment statute permits full consideration of evidence offered in mitigation at a capital sentencing proceeding. Requiring a jury to make determinations as a single entity, rather than as twelve individual sentencers, is not an unconstitutional restriction on the consideration of mitigating evidence. Indeed, it is no restriction at all, for Maryland's statute requires unanimity to reject, as well as accept, any mitigating circumstance. Anything short of unanimity results in a hung jury and, under the statute, a life sentence is then imposed.

II.

The instructions to the jury and the language of the verdict form clearly conveyed the need to make any determination unanimously. Therefore, the jury deliberated with a proper understanding of the law.

In this case, the Maryland Court of Appeals announced for future guidance an additional procedure to permit consideration of mitigating circumstances absent unanimity that was not included in these jury instructions. However, because this jury unanimously rejected all mitigating circumstances, the absence of an instruction on this additional procedure is of no consequence. Moreover, because the additional procedure serves only to resolve deadlock, it benefits the prosecution, not the defense, since the result of deadlock is a life sentence.

III.

The third issue presented requires this Court to reconsider its opinion issued last term in Booth v. Maryland, 107 S.Ct. 2529 (1987). The written summary of the victim's background introduced into evidence without objection was not inadmissible victim impact evidence. The summary contained no reference to the impact of the murder on family members. It merely humanized the victim without injecting arbitrariness or caprice into the sentencing proceeding.

ARGUMENT

I.

THE MARYLAND CAPITAL PUNISHMENT STATUTE AS INTERPRETED BY THE MARYLAND COURT OF APPEALS PERMITS FULL CONSIDERATION OF EVIDENCE PRESENTED IN MITIGATION OF SENTENCE.

Throughout the State proceedings, Petitioner contended that the Maryland capital punishment statute was unconstitutional under Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. 325 (1976), inasmuch as the statute

"mandated" a death sentence in any case where a sentencing jury could not unanimously agree on the existence of at least one mitigating circumstance. Additionally, Petitioner contended that the Maryland capital punishment scheme precluded the consideration of mitigating evidence in contravention of Lockett v. Ohio, 438 U.S. 586 (1978), because it required unanimity on the existence of each separate mitigating factor.

In considering Petitioner's contentions, the Maryland Court of Appeals did not repudiate Petitioner's interpretation of the decisions of this Court. Rather, the Court of Appeals held that Petitioner's interpretation of the operation of the Maryland statute was flawed and, as a result, the foundation for his argument was destroyed. The Maryland high court proceeded to articulate the mode for the consideration of mitigating factors and, under that construction, rejected Petitioner's contentions. There is no basis for this Court either to encroach upon the State court's

interpretation of the State law or to find that interpretation unconstitutional.[1]

A. The Maryland Capital Punishment Statute.

To avoid the arbitrary and capricious imposition of a death sentence in violation of the Eighth Amendment to the United States Constitution, the Maryland Capital Punishment Statute, Md.Ann. Code art. 27, §413 (1957, 1982 Repl.Vol.), responded to this Court's demand for guided discretion by requiring multiple findings to be made by a sentencer (either judge or jury, at the defendant's election) before a death sentence may be imposed. The sentence may be imposed only upon conviction of first degree murder.

---

[1] Petitioner apparently does not challenge the constitutionality of the Maryland Court of Appeals' interpretation of the law. Instead, he complains that he did not receive the benefit of that interpretation. Petitioner misperceives the court's holding as a new limitation on the operation of the statute. Because of this misperception, the State has set forth the applicable interpretation of the capital punishment law and explained its facial constitutionality. Petitioner's argument concerning the inadequacy of the jury instructions is addressed in Argument II, infra.

Art. 27, §412(b). Additionally, the State must demonstrate beyond a reasonable doubt that the defendant either was the principal in the first degree to the murder or had contracted for its perpetration. Art. 27, §413(e)(1). It is then incumbent upon the State to prove beyond a reasonable doubt the existence of one or more statutorily delineated threshold conditions, i.e., "aggravating circumstances," before the sentencer considers the question of life or death. Art. 27, §413(d). Unless the State demonstrates that the defendant either was a principal in the first degree or that he contracted for the perpetration of the murder, and that an aggravating circumstance exists, the process is aborted and a sentence of life imposed.[2]

Once the sentencer finds that the State has met its initial burdens, the sentencer proceeds to consider

---

[2] For offenses occurring after July 1, 1987, the sentencer must further determine whether the sentence should be life or life without the possibility of parole where the State has filed notice seeking the latter sentence. Md.Ann.Code art. 27, §412 (1957, 1987 Repl.Vol.).

whether the evidence demonstrates by a preponderance the existence of any mitigating circumstances. Art. 27, §413(g). If any mitigating circumstances are found, they are to be weighed against the aggravating circumstances to determine the appropriate sentence. If none is found, no weighing process is conducted — the sentence is death.

Seven mitigating circumstances are specifically enumerated for the sentencer's consideration.[3] Number eight permits the sentencer to articulate any other factor relevant to the crime or to the defendant that it finds militates against a sentence of death. Art. 27, §413(g). Pursuant to Maryland Rule 4-343, a prepared verdict sheet is completed by the sentencer

---

[3] The seven legislatively articulated mitigating circumstances may be summarized as: (1) lack of a prior record for violent crimes; (2) participation of the victim in the crime; (3) murder committed under duress, domination, or provocation; (4) impaired capacity of the defendant; (5) youthful age of the defendant; (6) defendant's act not the sole proximate cause of death; and (7) defendant would not constitute a continuing threat to society.

in each case, setting forth the aggravating factors and the mitigating factors relied upon in determining the appropriate sentence. There is a blank for "Yes" and a blank for "No" alongside each of the eight mitigating circumstances listed.

To find the existence of any mitigating factor, a sentencing jury must be unanimous. The sentencing jury also must be unanimous to reject any mitigating factor. If, after a reasonable time, the jury cannot unanimously agree on the existence or non-existence of a mitigating circumstance, the jury is declared deadlocked and excused. Art. 27, §413(k)(2).[4] The result of a deadlocked jury is the mandatory imposition of a life sentence. Id.[5]

---

[4] This deadlock provision also is applicable to the ultimate balancing determination in which the question of life or death is decided.

[5] See footnote 2, supra.

B. The Maryland Court of Appeals' interpretation of the statutory scheme is constitutional.

Petitioner based his assertion of unconstitutionality in the state court on his own interpretation of how a jury would consider mitigating circumstances. Under his interpretation of the statute, a jury would mark "Yes" for those mitigating circumstances unanimously found to exist and would mark "No" any time there was a lack of unanimity with respect to "Yes." Petitioner postulated before the Maryland Court of Appeals a situation where 11 jurors could have favored a mitigating factor but, because of a single holdout, "No" would have to be marked. The import, Petitioner contended, was that, because of the single holdout, a death sentence was mandated by the absence of a finding of any mitigating circumstance.

The Court of Appeals corrected Petitioner's misinterpretation of the statute, noting that just as "Yes" would be appropriate only where a sentencing jury unanimously agreed upon the existence of the mitigating circumstance, to mark "No" similarly

required unanimity. The single holdout would not result in a mark of "No" for all mitigating circumstances, because there would be no unanimous "No" vote. Instead, the jury would simply be unable to agree.[6] Rather than a death sentence being imposed by operation of law under Maryland Rule 4-343(e) (verdict sheet, "Determination of Sentence" section, subsection 3), a sentence of life would be imposed by operation of law pursuant to Article 27, §413(k)(2) (where jury not able to agree unanimously within reasonable time, court shall dismiss jury and impose sentence of imprisonment for life).

Given this construction, Woodson v. North Carolina and Roberts v. Louisiana are inapposite. The

---

[6] As required by the Maryland Code, Art. 27, §413(b), this sentencing proceeding was conducted before the jury that determined the defendant's guilt. A jury deliberating guilt/innocence is aware that a lack of unanimity on "Guilty" does not automatically result in a finding of "Not Guilty." Rather, "Not Guilty" requires an independent unanimous determination. This jury was simply required to apply that concept again.

sentence imposed in this case was not based solely on the crime without regard to the individual character of the defendant. The sentencer possessed the means to consider anything about the defendant when imposing sentence. To unanimously reject the evidence in mitigation, the evidence had to be considered. The Maryland statute, which permits the consideration of any other factor relevant to the crime or the defendant that militates against a sentence of death, is totally distinguishable from the statutes found unconstitutional in Woodson and Roberts. Cf. Sumner v. Shuman, 107 S.Ct. 2716 (1987) (statute mandating death sentence where murder committed by inmate serving life without parole held unconstitutional). There is no constitutional infirmity.

As a corollary to the proscription on mandatory sentences and the recognition of the need for individualized sentences in capital cases, this Court ruled in Lockett v. Ohio that there can be no limitation on the introduction of evidence offered in

mitigation of sentence. 438 U.S. at 604. In reliance on Lockett, Petitioner argued that the unanimity requirement, as it related to the finding that a mitigating factor existed, served to preclude consideration of mitigating evidence. Initially, a unanimity requirement does not preclude the consideration of any mitigating evidence and therefore is not the type of restriction proscribed by Lockett.

Lockett concerned a statute that permitted consideration of mitigating evidence only as it related to (1) the victim's involvement in the crime, (2) the duress or coercion under which the defendant committed the crime, and (3) the diminished capacity of the defendant. A similar limitation was addressed by this Court in Eddings v. Oklahoma, 455 U.S. 104 (1982), where a sentencing judge articulated that he could not by law consider evidence relating to the background of the offender. This Court equated this erroneous interpretation of the law with the statutory limitation in Lockett, and held that the judge had improperly

restricted his considerations underlying the imposition of sentence. 455 U.S. at 113.

Later, in Skipper v. South Carolina, 106 S.Ct. 1669 (1986), a ruling that precluded the introduction of evidence from the defendant's wife and correctional officers concerning the defendant's conduct in prison was also found to constitute an improper restriction on the ability to impose an individualized sentence. Again, last term, in Hitchcock v. Dugger, 107 S.Ct. 1821, 1824 (1987), "the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of non-statutory mitigating circumstances, and . . . the proceedings therefore did not comport with the requirements of Skipper . . ., Eddings . . ., and Lockett."

There is no such restriction precluding the consideration of mitigating evidence in the Maryland statutory scheme. The Maryland statute permits the jury to find and weigh as a mitigating circumstance "any other facts which the jury or the court

specifically sets forth in writing that it finds as mitigating circumstances in the case." Article 27, §413(g)(8). There is absolutely no restriction on what the defendant may put forth by way of evidence.

Nor is there any improper restriction on the consideration of this evidence. Under the interpretation of the statute proffered by Petitioner, an unconstitutional restriction existed in that unanimity on a particular mitigating circumstance was required before it could be weighed in determining the appropriate sentence. However, Lockett and Eddings relate to restrictions on "input," not the subsequent deliberative process. Although a jury has twelve component parts, it is a single entity. The rejection of a mitigating circumstance, after introduction and full consideration of the evidence, is simply a factual determination. There is no legal impediment to the consideration of the evidence.[7] The requirement of

---

[7] Under Petitioner's definition of an unconstitutional restriction, even a majority requirement would work a (Continued)

jury unanimity is simply not the type of restriction found unconstitutional in Lockett and Eddings. See State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144, 157 (1983).[8]

Most importantly, because the Maryland scheme requires unanimity to reject a mitigating circumstance, any particular legislative mitigating circumstance will escape consideration only after its existence is unanimously rejected by the sentencing jury. An "other" mitigating circumstance will be

---

restriction on the consideration by the minority. Petitioner views a jury as twelve independent sentencers operating free of the views of the others. Such a view is completely contrary to any notion of guided discretion.

[8] The focus on restrictions to "input" rather than on deliberation is evident from the application of Lockett to the statute in Jurek v. Texas, 428 U.S. 262 (1976). Lockett v. Ohio, 438 U.S. at 606-07. The Texas statute passed muster because the state courts interpreted "future dangerousness" to permit the introduction of limitless evidence that could reflect on this finding. Some of this evidence would mitigate against a death sentence, but might not be considered in the ultimate determination if the jury deemed it irrelevant to the question of "future dangerousness." Yet, no improper restriction was cited.

rejected only after the jury considers the evidence and unanimously concurs that it supports no such "other" mitigating circumstance. Any juror who is convinced that a mitigating factor has been demonstrated by a mere preponderance of the evidence cannot be forced to surrender that view and impose a sentence of death simply by being outvoted. His determination to retain his view will result in a deadlocked jury and a life sentence.

The existence or non-existence of any particular mitigating circumstance is a question of fact for the sentencer. After consideration, the sentencing jury may choose to reject the evidence offered in mitigation as being without mitigating value. However, there is no legal restriction on the consideration of mitigating evidence that would render the statutory scheme unconstitutional.

C. The state court's interpretation of the Maryland statute is entitled to deference.

It is beyond question that a state court has the sole power to interpret its statutes. Garner v.

Louisiana, 368 U.S. 157, 169 (1961). Only on rare occasions, where a state court interpretation of state law appears to be "an obvious subterfuge to evade consideration of a federal issue," will the state interpretation be reexamined by this Court. Mullaney v. Wilbur, 421 U.S. 684, 691 n.11 (1975).

The interpretation in this case was clearly not an "obvious subterfuge." Historically, all determinations by a jury have been required to be unanimous. See Apodaca v. Oregon, 406 U.S. 404, 407-08, nn. 2 & 3 (1972). If all twelve jurors are not convinced of guilt in a trial, the jury does not automatically return a verdict of "Not Guilty." Rather, where a jury is unable to agree, a mistrial is declared. Cf. United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824) (jury unable to agree on verdict constitutes manifest necessity for mistrial).

Additionally, as the amicus concedes (Br. of Amicus at 9), the construction by the Court of Appeals constitutes a grammatically correct interpretation of

the language in Section II of the verdict sheet. "In addition to the clause referring to each mitigating circumstance marked 'yes,' the clause referring to each mitigating circumstance marked 'no' is also the object of 'we unanimously find that.' " Mills v. State, 310 Md. 33, 58, 527 A.2d 3, 15 (1987). Under these circumstances, there is no basis upon which to reexamine the Maryland court's construction of its own statute and rule.

II.

THE JURY INSTRUCTIONS IN PETITIONER'S CASE PROVIDED PROPER GUIDANCE FOR THE CONSIDERATION OF THE EVIDENCE PRESENTED IN MITIGATION.

Petitioner argues that, regardless of the constitutionality of the current interpretation of the statute announced in his case, he was denied the benefit of it. Specifically, he asserts that the instructions to the jury failed to convey "that mitigating circumstances not unanimously found could nevertheless be considered in the balancing process."

(Br. of Petitioner at 16). Petitioner's focus is misplaced. Because the instant instructions were not susceptible to any interpretation other than that unanimity was required to reject any mitigating circumstance, it cannot reasonably be inferred that any juror believed that a mitigating circumstance had been shown.[9]

In instructing the sentencing jury, the trial judge stated, in pertinent part:

> Let me remind you that in reaching your determination as to any of the issues raised by the case and presented to you on this sentencing form your verdict must be unanimous; that is, all twelve of you must agree. [(J.A. 69)]
>
> * * *
>
> Now should you find the existence unanimously and beyond a reasonable doubt of aggravating circumstance number

---

9 Petitioner took no exception to the instructions given (J.A. 74). As a result, review of the instructions in this case is limited to a determination of whether the instructions, taken as a whole, so infected the proceeding with unfairness as to constitute a denial of due process. See Henderson v. Kibbe, 431 U.S. 145, 154 (1977).

> two and mark that yes, then you should proceed to section two, which begins at the top of page two. That provides that based upon the evidence we unanimously find that each of the following mitigating circumstances which is marked yes has been proven to exist by a preponderance of the evidence, and each mitigating circumstance marked no has not been proven by a preponderance of the evidence. Again I stress that your finding as to mitigating circumstances must be unanimous, that is you must all agree. [(J.A. 70-71)]
>
> * * *
>
> Again let me stress the requirement of unanimity, that is your finding under section two and your findings under section three must be one in which all twelve of you agree. [(J.A. 73)]
>
> * * *
>
> Again let me remind you of the burdens of proof as I have defined them for you and the requirement that your verdict or your decision with regard to any of these items must be unanimous. [(J.A. 74)]

It is clear from the above that the jury was adequately informed that <u>any</u> determination in <u>any</u> of the sections on the verdict form had to be unanimous. There was nothing in the instructions to indicate that

unanimity was not required to reject a mitigating circumstance. With the understanding that unanimity was required for any finding, the jury marked "No" for each mitigating circumstance. Under the instructions given, the jury in Petitioner's case had to apply the interpretation of the statute articulated by the Court of Appeals, i.e., the need for unanimity to reject a mitigating circumstance.[10]

---

[10] Petitioner's reliance upon Andres v. United States, 333 U.S. 740 (1948), in support of his contention that the instructions here require reversal is misplaced. In Andres, death was the mandatory sentence for first degree murder unless qualified by the jury. In construing the federal statute in question, this Court held that qualification of the verdict was mandated unless the jury unanimously concluded that death was appropriate. Id. at 749. The jury had been instructed that "before you may return a qualified verdict of murder in the first degree without capital punishment, that your decision to do so must, like your regular verdict, be unanimous." Id. at 751. The Government conceded that if petitioner's interpretation of the statute was accepted (as it was), the instructions were inadequate. Here, the jury was not instructed that a mitigating circumstance should be affirmatively rejected if not unanimously found to exist. Rather, as outlined above, the jury was instructed that unanimity was required for all findings.

Petitioner ignores these instructions on unanimity and instead assumes that the instructions only required unanimity to find — and not to reject — a mitigating circumstance. Proceeding from this faulty premise, he assigns error of constitutional magnitude to the absence of instructions covering that part of the Maryland Court of Appeals' opinion where, in dicta, the court indicated that a jury that was not unanimous did not have to deadlock on a mitigating factor.[11] This aspect of the decision is, however,

---

[11] In Section VI.A. of the Mills opinion, the Maryland Court of Appeals rejected the contention that the Maryland death penalty statute as applied was unconstitutionally mandatory, relying on the deadlock provision discussed above. In Section VI.B. of the opinion, the Court proceeded to "comment generally upon the required jury determinations . . . in light of the traditional requirement of unanimity" for future guidance. Mills v. State, 310 Md. at 63, 527 A.2d at 17. In Section VI.B., the court indicated that, as an alternative to deadlock, the jury could pass over the mitigating circumstance, leaving both the "Yes" and "No" blanks empty, and any individual juror finding that the circumstance had been shown could weigh that circumstance in determining the appropriate penalty. Mills v. State, 310 Md. at 67-68, 527 A.2d at 19.

irrelevant to Petitioner's case, since the unanimous rejection of all mitigating circumstances under proper instructions on unanimity indicated there was no dissension within the jury that would make this provision applicable.[12] There is no indication anywhere that there was a lack of total agreement.

Moreover, application of this alternative to Petitioner's case would have benefitted the prosecution not Petitioner. As stated above, and as noted by the Maryland Court of Appeals, the impact of a lack of unanimity is a declaration, after a reasonable period of time, that the jury cannot agree and, under

---

[12] In support of his argument that a mark in the "No" blank likely reflects a non-unanimous vote, Petitioner ignores the instructions in this case and instead goes outside the record to focus upon the outcomes in two other sentencing proceedings held since the decision in this case where the jury's verdict sheet reflected division on some mitigating factors. No conclusion can be drawn from a proceeding where the jury deliberates with knowledge that unanimity is not required and, therefore, with no motivation to achieve agreement. Cf. Lowenfield v. Phelps, 56 U.S.L.W. 4071 (U.S. Jan. 13, 1988) (unanimity achieved after Allen charge given despite poll where jury indicated further deliberation would not be productive).

Article 27, §413(k)(2), the imposition of a life sentence. With respect to deadlock on the existence of a mitigating circumstance, a life sentence would be required no matter how little weight the mitigating circumstance in dispute may have carried. The procedure articulated by the Court of Appeals for these situations now permits the sentencer to move on to the weighing process despite an inability to agree over the existence of a mitigating circumstance.[13] Thus, under the court's articulation of the law a weighing process can occur, and a death sentence can result, in a situation that otherwise would have resulted in a hung jury. Even if this aspect of the decision was relevant

---

[13] The Court of Appeals determined that the capital punishment statute did not address the procedure to follow where there was a lack of unanimity on the existence of a mitigating factor. The court noted that it was empowered by the statute to fill procedural voids but that the Rule previously adopted did not address this situation. Mills, 310 Md. at 64-68, 527 A.2d at 18-20. Under these circumstances, the court examined the legislative intent and announced a procedure for this situation. This pronouncement has now been officially adopted as a new verdict form in Md.Rule 4-343.

to Petitioner's case, Petitioner was not denied the "benefit" of any "reconstruction."

In context, it is clear that Petitioner received the benefit of the Court of Appeals' articulation of the law in his case. Petitioner argued to the state court that the lack of unanimity on "Yes" would result in the marking of "No" on a mitigating factor, and "No" on all mitigating factors would result in a death sentence without undertaking a weighing process, even though some (and perhaps most) jurors believed mitigating circumstances were present. The Court of Appeals indicated that Petitioner's interpretation of the law was incorrect. "No" was not simply a place to mark for "Not Yes;" it was an ultimate finding that necessitated an unanimous rejection of the mitigating factor. A review of the jury instructions (to which no objection was lodged) indicates that the jury, in fact, was repeatedly advised that <u>any</u> finding had to be unanimous. As a result, the constitutional interpretation of the Maryland statute articulated by the Court of Appeals in Petitioner's case was applied to Petitioner.

III.

THE INTRODUCTION AT SENTENCING OF EVIDENCE DESCRIBING THE BACKGROUND OF THE MURDER VICTIM WAS CONSISTENT WITH THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Despite the dissimilarities between the evidence about the victim in this case and that considered by this Court in <u>Booth v. Maryland</u>, 107 S.Ct. 2529 (1987), Petitioner contends that the introduction of "victim impact" evidence in his case violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution. The State of Maryland continues to urge, as it did in <u>Booth</u>, that the introduction of evidence demonstrating the extent of the harm caused by a murder is a relevant circumstance of the crime to consider in a capital sentencing proceeding. Because the extent of the harm caused is a proper sentencing consideration,

"victim impact" evidence ought to be permitted. At a minimum, the prosecution should not be precluded from humanizing the victim with background evidence.

In this case, the sentencing jury was informed through a written interview summary introduced without objection that the victim, Paul Brown, and his brother came from a family of six, but at a young age, because of neglect, were removed from their parents' custody and placed in separate foster homes. Brown was a hyperactive child, who ran away constantly from the various homes in which he had been placed. At the age of 15, he started living on the streets and was eventually sent to the Maryland Training School for Boys. His brother opined that Paul "was a good person who had a tough life, a lot of bad breaks, no family, no home, nobody to really give him a chance. I sometimes think he felt more secure in prison, because he had no one on the outside. Sure he committed crimes, but he wasn't violent. He did what he had to do to

survive, and he got involved with a lot of bad people." (J.A. 85-86).

There was no evidence introduced in this case concerning the effect that Paul Brown's death may have had on his brother and sister-in-law. There was no mention of any other family or friends that may have been left behind. There was no evidence suggesting that the community at large suffered from the loss of one of its stalwart members. There was no evidence indicating that Paul Brown led a life to be valued over others. The evidence showed only one thing — that the victim in this case was not just a carcass, not just a nameless mass forced to endure the tortures imparted by Petitioner; he was a person.[14]

---

[14] The amicus asserts that this background evidence introduced at sentencing portrayed only the positive side of the victim and that Petitioner was precluded from introducing any evidence to contradict his portrayal in contravention of Gardner v. Florida, 430 U.S. 349 (1977). Gardner is inapposite. Petitioner's attempt to introduce the negative character evidence came at trial and was rejected as irrelevant. He never renewed his attempt to introduce this evidence at sentencing. As a result, no restriction is evident.

Above all else, the combined issues presented in this case demonstrate the imbalance existing between the prosecution and the defense in a capital punishment proceeding. On the one hand, under Lockett, Eddings, Skipper, and Hitchcock, there can be no limits on what a defendant can place before the jury to evoke emotion and to show the type of person that stands before the sentencer. Evidence concerning what happened to the defendant in childhood cannot be excluded (Eddings); evidence concerning the behavior of the defendant after the offense and after arrest, but before sentencing, cannot be excluded (Skipper). On the other hand, under Petitioner's interpretation of Booth, nothing can be introduced to humanize the victim.

In holding that victim impact evidence was "irrelevant to a capital sentencing decision, and that its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an

arbitrary and capricious manner," Booth v. Maryland, 107 S.Ct. at 2533, this Court focused upon the fact that the statement in that case centered upon the effect of the murder on the family, the articulateness of the family members, and the standing of the victim in the community. Id. at 2534. No comparable evidence was presented here.

The evidence was presented in the form of a summary prepared by a probation agent. Questions regarding how the victim's family was affected or how well they could articulate were never generated. The evidence merely described an individual, one who had been in trouble all his life and who, at the time of his murder, was serving time in prison.

Evidence about the victim demonstrating the extent of the harm caused can be introduced in a manner so limited as to minimize the possibility of a sentence predicated on passion. Permitting such evidence would enable the sentencer to see the victim as a real person, without generating concern that a

particular sentence is based upon considerations totally irrelevant to the sentencing process. This case presents a perfect example of such evidence about the victim.

Although this Court in Booth included, within the scope of "victim impact" evidence, reference to the character of the victim, 107 S.Ct. at 2533, this Court also indicated that "similar types of information may well be admissible because they relate directly to the circumstances of the crime." 107 S.Ct. at 2534, n.10. Utilizing this distinction, evidence concerning a victim's affluent lifestyle and plans for the future has been held admissible at sentencing because it may have helped explain her whereabouts on the night of the murder. State v. Bell, 360 S.E.2d 706, 712 (S.C. 1987). There is no principled way to draw such a fine distinction. Rather, objective evidence of character

to humanize the victim of the crime ought be permitted in any case.[15]

As articulated by Justices White and Scalia in their dissents in Booth, the determination of an appropriate penalty is dictated not only by the "moral guilt" of the perpetrator, but also by the extent of the harm he caused. 107 S.Ct. at 2539 & 2541. Despite the fact that the penalty of death is unique from all others, the extent of the harm caused is an appropriate consideration in a capital punishment proceeding — especially where the "harm" is limited to knowing that

---

[15] In Maryland, the holding of Booth has been asserted in support of claims of error in contexts well beyond formal victim impact statements. In State v. Colvin, Sept. Term, 1986, No. 88, currently pending before the Maryland Court of Appeals, Booth error was claimed in the prosecutor's description of the victim in opening argument. In Hunt v. State, Sept. Term, 1987, No. 53, also pending, Booth error was said to have been generated when the victim's family shed tears at trial when a tape recording of the victim's voice was played. The defense in Hunt, relying on Booth, even sought to exclude the victim's wife from the courtroom.

the victim was an individual with an identity and his own personal characteristics.[16]

---

[16] Mills specifically stated that he had no objection to the introduction of the victim impact evidence in this case (J.A. 14-15). Nor was any issue concerning the admissibility of victim impact evidence raised by Mills on his automatic direct appeal. However, the issue was addressed by the Maryland Court of Appeals in view of the temporal proximity between this Court's opinion in Booth and the Mills decision. Because the Maryland court found that the evidence in this case did not constitute a victim impact statement such as that proscribed in Booth, the court did not assess the possibility that any error in the introduction of this evidence was harmless, although the court did note that "the content of this statement would not inflame a jury or otherwise prejudice Mills." 310 Md. at 72-73 n. 14, 527 A.2d at 22 n.14.

Even if the introduction of this evidence was error, it is harmless, not only because of the objective nature of the statement itself, but also because of the absence of any weighing process in this case. As was implicitly recognized in Booth, a victim impact statement is irrelevant to the presence or absence of any aggravating or mitigating circumstance. Rather, victim impact evidence was asserted to be a circumstance of the crime that would constitute the flesh on the skeleton on the aggravating side of the scale, together with considerations such as the heinousness or atrocity of the crime, for purposes of weighing. Here, however, there was no weighing. Petitioner was sentenced to death because the jury found no mitigating factor. Inasmuch as the existence of victim impact evidence had no relationship to that conclusion, its admission does not necessitate the (Continued)

CONCLUSION

The Maryland capital punishment statute is not mandatory in any respect. It permits full consideration of any evidence offered by the defense in mitigation of sentence. If the jury unanimously concludes that the evidence presents no circumstance of mitigation, the death sentence is to be imposed without a weighing process. This is logical inasmuch as there is nothing on the side of mitigation to weigh. Given the absence of any limitation on the defendant's right to produce evidence, and the absence of any limitation on the jury's right to find mitigation, the procedure is constitutional.

The constitutional Maryland capital punishment scheme was properly applied in Petitioner's case. The jury was instructed in conformance with the law as articulated by the Maryland Court of Appeals in Petitioner's case. No "new" principle of law which could inure to Petitioner's benefit was denied him. No

---

setting aside of the death sentence.

"limiting" revision of law to render the ultimate decision constitutional was applied to his case. No improper evidence was introduced to render his death sentence suspect.

For these reasons, the State of Maryland respectfully requests that the judgment of the court below be affirmed.

Respectfully submitted,

J. JOSEPH CURRAN, JR.,
Attorney General of Maryland

CHARLES O. MONK, II,
Deputy Attorney General

GARY E. BAIR,
Assistant Attorney General

RICHARD B. ROSENBLATT,*
Assistant Attorney General

The Munsey Building
7 North Calvert Street
Baltimore, Maryland 21202
(301) 576-6410

Counsel for Respondent

* Counsel of Record

No. 87-5367

Supreme Court, U.S.
FILED
JAN 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RALPH MILLS,

Petitioner,

VS.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JULIUS L. CHAMBERS
RICHARD H. BURR III
DEBORAH FINS*
99 Hudson Street
New York, New York 10013
(212) 219-1900

ANTHONY G. AMSTERDAM
New York University
School of Law
40 Washington Square South
Room 327
New York, New York 10012
(212) 998-6199

Attorneys for Amicus Curiae

*Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
STATEMENT OF INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
THE LOCKETT ISSUE	4
THE BOOTH ISSUE	19
CONCLUSION	21

TABLE OF AUTHORITIES

Cases:	Page
Andres v. United States, 333 U.S. 740 (1948)	10
Booth v. Maryland, ___ U.S. ___, 96 L.Ed.2d 440 (1987)	2,3,19,20
Eddings v. Oklahoma, 455 U.S. 104 (1982)	10,14
Gardner v. Florida, 430 U.S. 349 (1977)	2,3,20
Lockett v. Ohio, 438 U.S. 586 (1978)	passim
Sandstrom v. Montana, 442 U.S. 510 (1979)	8
Skipper v. South Carolina, ___ U.S. ___, 90 L.Ed.2d 1 (1986)	20
Statutes and Codes:	
Md. Code Art. 27 § 413(g)(4) (1986 Ann. Supp.)	14
Md. Code Art. 27 § 413(g)(5) (1986 Ann. Supp.)	15
Other Authorities	
Physician's Desk Reference (41 ed. 1987)	13

No. 87-5367

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

RALPH MILLS,

Petitioner,

vs.

STATE OF MARYLAND,

Respondent.

On Writ of Certiorari
to the Court of Appeals of Maryland

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE

The NAACP Legal Defense Fund is a not-for-profit corporation organized under the laws of New York for the purpose, among others, of assisting Black persons to secure their constitutional rights by the prosecution of lawsuits. Recognizing that the death penalty has traditionally

borne most heavily upon members of racial minorities and other disadvantaged segments of the population, the Fund has undertaken to represent Blacks and others charged with capital offenses since the days of the Scottsboro Boys cases. The Fund represented the petitioners in Lockett v. Ohio and in Gardner v. Florida and appeared before this Court as amicus curiae in Booth v. Maryland -- the major cases whose principles are at issue in this one.

Letters of consent by the parties to the filing of this brief are being submitted to the Clerk with the brief.

SUMMARY OF THE ARGUMENT

1. Mr. Mills' sentencing violated Lockett v. Ohio, 438 U.S. 586 (1978), because the instructions to the jury at the penalty phase of his capital trial prevented the jurors from giving

independent mitigating weight to the evidence proffered in mitigation. Reasonable jurors could have understood the instructions to require them to reject any evidence which they did not unanimously agree supported a specific statutory mitigating circumstance.

2. The use of the victim impact statement in this case violated not only Booth v. Maryland, ___ U.S. ___, 96 L.Ed.2d 440 (1987), but Gardner v. Florida, 430 U.S. 349 (1977) as well. The defense was prevented from introducing evidence of the victim's reputation for violence in support of a defense of provocation, but the victim impact statement described the victim as a non-violent person. The defense was not permitted to rebut, deny or explain the evidence of non-violence.

ARGUMENT

I. The Lockett Issue

Two questions seem to us decisive of Ralph Mills' claim under Lockett v. Ohio, 438 U.S. 586 (1978). Might a reasonable juror have understood the instructions and verdict form submitted at the sentencing phase of Mills' trial to mean that the jury was forbidden to consider any mitigating circumstance proffered by Mills unless the jurors unanimously found that that specific circumstance was proven to exist by a preponderance of the evidence? If so, did these instructions and verdict form, in the context of Maryland's definition of statutory mitigating circumstances and the particular mitigating evidence adduced by Mills, preclude the jury from giving Mills' evidence the "independent mitigating weight" to which it was entitled under

Lockett (438 U.S. at 605)?

(1) The answer to the first question is plainly yes. Now that the ambiguities of the Maryland statute have been resolved by the laborious interpretation placed upon it below, such misleading instructions will doubtless not be given in the future. But that is no solace to Mills. His jury was handed a verdict form which set out seven statutory mitigating circumstances each accompanied by a box to check "yes" or "no." Following these was an eighth, open-ended category of mitigation: "Other mitigating circumstances exist, as set forth below," with blanks below it and the ubiquitous "yes" and "no" checkblocks alongside. All of this was introduced, on the form, by the preamble: "[B]ased upon the evidence we unanimously find that each of the following mitigating circumstances which

is marked yes has been proven to exist by a preponderance of the evidence, and each mitigating circumstance marked no has not been proven by a preponderance of the evidence." (J.A. 101.) The trial judge read and explained this portion of the form to the jury in these words:

> "[B]ased upon the evidence we unanimously find that each of the following mitigating circumstances which is marked yes has been proven to exist by a preponderance of the evidence, and each circumstance marked no has not been proven by a preponderance of the evidence. Again I stress that your finding as to mitigating circumstances must be unanimous, that is you must all agree."

(J.A. 70-71.) (Earlier in the charge the judge had told the jury, regarding the sole aggravating circumstance alleged by the prosecution, that "in considering these matters, you must consider whether aggravating circumstance number two has been proven beyond a reasonable doubt. If

you unanimously conclude that it has been so proven, you should answer that question yes. If you are not so satisfied, then of course you must answer no." (J.A. 70.))

The majority in the Court of Appeals found that these instructions meant that the jury was required to be unanimous in order to check any box on the verdict form either "yes" or "no." If the jury was non-unanimous as to any item, then its proper course was to leave that item blank. In other words, the instruction meant:

> Based upon the evidence we unanimously find[: (1)] that each of the following mitigating circumstances which is marked yes has been proven to exist by a preponderance of the evidence, and [(2) that] each mitigating circumstance marked no has not been proven by a preponderance of the evidence.

It did not mean:

> Based upon the evidence we unanimously find that each of the following mitigating circumstances which is marked yes has been proven to exist by a preponderance of the evidence[;] and

each mitigating circumstance marked no has not been [so] proven by a preponderance of the evidence.

Perhaps some reasonable jurors might have read the instructions and the verdict form this way. But equally reasonable jurors[1] might have thought: "We have to be unanimous to make a finding and to check a box yes. If we're not unanimous, we can make no finding, so we check the box no." Nothing on the verdict form or in the instructions said that unanimity was required for a non-finding as well as for a finding. Nothing on the verdict form or in the instructions said or hinted that the jury was free to leave any item unanswered. (As the dissent below pointed out, no Maryland jury using this particular form has ever left a question unanswered.) A grammarian might have

---

1 See Sandstrom v. Montana, 442 U.S. 510, 514 (1979).

parsed the form -- as did the majority in the Court of Appeals -- by observing that "the clause referring to each mitigating circumstance marked 'no' is also the object of 'we unanimously find that.'" (J.A. 131.) But a practical-minded member of the jury panel might then have asked the grammarian: "So if we can't say 'yes' unanimously, what are we supposed to do? Where's the third box, for 'we just can't agree'?" There was none -- nor any explanation for its absence. And since both the verdict form and the court's instructions dealing with the weighing of aggravating and mitigating circumstances were explicit in identifying "circumstances marked 'yes'" with "circumstances unanimously found to exist" (see J.A. 101, 73) the grammarian would have had an uphill argument against the practical-minded juror in demonstrating

that no answer rather than a "no" answer was expected from a non-unanimous jury.

"That reasonable men might derive a meaning from the instructions given other than [what the Court of Appeals deemed to be] the proper meaning . . . is probable. In death cases doubts such as those presented here should be resolved in favor of the accused." Andres v. United States, 333 U.S. 740, 752 (1948).[2] Mills' life should not be taken on the merest speculation that the ambiguous jury instructions and verdict form revealed by this record were read in one rather than another equally plausible fashion by his

---

2 See also Eddings v. Oklahoma, 455 U.S. 104, 117-118 (1982) (concurring opinion of Justice O'Connor): "Because sentences of death are 'qualitatively different' from prison sentences, . . . this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim . . . or mistake."

jurors.

(2) The answer to the second question, whether the effect of the jury instructions and verdict form was to forbid the jury's consideration of mitigating evidence in violation of Lockett, is also plainly yes. Two of Maryland's statutory mitigating circumstances that were given to the jury to be checked "yes" or "no" on the verdict form -- and the two to which Mills addressed most of his defensive evidence -- were:

> The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, or emotional disturbance (J.A. 102),

and

> The youthful age of the defendant at the time of the crime (J.A. 102).

Mills was 20 at the time of the crime (J.A. 91), and in the second year of a 30-year sentence for a prior second-degree murder (J.A. 77). Before that, as his mother testified:

> "I went to Court every year since I can remember Ralph being twelve, thirteen years old, every single year, sometimes two, three times a year, sometimes two or three times a month."

(J.A. 54.) Mills "developed drug and alcohol abuse problems at a very early age" (Special Court Investigation, admitted at trial as State's Exhibit 1), was diagnosed as suffering from "MBD" or "minimum brain damage" (J.A. 48) -- an organic condition which, according to a prison-initiated psychological evaluation conducted 6 months prior to his present crime, "may effect [sic] his intellectual functioning and contribute to his acting out behavior" (State's Exhibit 3) -- and

might or might not also have been afflicted with schizophrenia or some other psychosis.[3]

What were the jurors to do with this evidence? Let us assume that a couple of them -- say, 3 of them -- took the view that the evidence established the

---

[3] Mills' mother testified that when he first began having behavioral problems at school he was seen on an emergency basis at the local Mental Hygiene Clinic. (J.A. 47-48.) The initial diagnosis was "minimal brain damage." (J.A. 48.) Later, a second provisional diagnosis was added which was not expressly stated to Mrs. Mills. But, she testified:

> "I asked [the therapist] ... if he was showing any signs of schizophrenia, cause there is schizophrenia in our family ... I was grabbing at anything I could grab at. She said yes. That's all she said was yes, but we can't tell now, it's too early. Then they ... decided to put him on Mellaril ...."

(J.A. 48.) Mellaril is used in the treatment of schizophrenia and other psychotic disorders. See Physician's Desk Reference 1778-79 (41 ed. 1987).

statutory mitigating circumstance that Mills' "capacity . . . to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, or emotional disturbance" (Md. Code Art. 27 §413(g)(4)(1986 Ann. Supp.)). The remaining 9 disagreed, being unconvinced that a mental condition diagnosed as "minimal brain damage" met the statutory criterion of "substantially" impairing Mills' capacity -- although these 9 jurors did believe that the condition was mitigating to some extent, particularly in combination with Mills' relative youth. Some of the 9 jurors, indeed, taking the view that "youth is more than a chronological fact,"[4] believed that Mills had shown by a preponderance of the

---

4 Eddings v. Oklahoma, 455 U.S. at 115.

evidence the distinct statutory mitigating circumstance described in the verdict form as "[t]he youthful age of the defendant at the time of the crime" (Md. Code Art. 27 §413(g)(5)(1986 Ann. Supp.)). Other jurors, however, interpreted the term "youthful age" more narrowly and were unwilling to find this statutory mitigating circumstance -- although they would have been inclined to accord some weight to Mills' chronological age of 20, and some to his emotional immaturity as well. But under the instructions and the verdict form, neither Mills' organic brain damage nor his immaturity could be given "independent mitigating weight"[5] -- nor could they be considered in mitigation at all -- because the jurors had not unanimously agreed in finding that they met the specific statutory definitions set

---

5 Lockett v. Ohio, 438 U.S. at 605.

forth in the instructions and the verdict form.

The unconstitutional result would be that although all 12 jurors were inclined to attribute significant mitigating value to slightly different aspects of the same evidence, none of the 12 could give any of this mitigating evidence any weight at all. To the contrary, their obligation as instructed would be:

(1) to mark the verdict form for the two pertinent statutory mitigating circumstances "no" -- there being, by hypothesis, no unanimity for either;

(2) to mark the verdict form for the non-statutory mitigating circumstance "no" -- since this category of mitigation was defined by the instructions as "any other mitigating circumstances not specifically enumerated in the first seven that we have just reviewed" (J.A. 73), and it would

hardly occur to jurors who had just debated and, for want of unanimity, rejected both "substantial" mental incapacitation and "youth" to turn around and view "minimal brain damage" and immaturity as "other" mitigating circumstances not previously reviewed; and

(3) to return a death verdict without further consideration of mitigation -- because this is what the jury instructions and the verdict form both said to do "if all of the answers [to the mitigating circumstances on the verdict form] were marked 'no'" (J.A. 103; see also J.A. 73).

The Ohio statutory scheme condemned in Lockett did not preclude the admission into evidence of "detailed information about [a capital defendant's] . . . intelligence, character, and background." 438 U.S. at 594. To the contrary, it

called for "considering the nature and circumstances of the offense and the history, character, and condition of the offender" in determining, yes or no, the presence of the three statutory mitigating circumstances prescribed. 438 U.S. at 612. Ohio law was clear that "the sentencing judge or judges may consider factors such as the age and criminal record of the defendant in determining whether any of the mitigating circumstances is established." 438 U.S. at 608. But because all of this broad array of evidence was "relevant for mitigating purposes only if it is determined that it sheds some light on one of the three statutory mitigating factors," the Ohio procedure was declared unconstitutional, 438 U.S. at 608, on the principle that a death-sentencing process

> "that prevents the sentencer in all capital cases from giving

> independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty."

(438 U.S. at 605.) That is precisely the risk to which Maryland exposed Ralph Mills on this record, and his death sentence violates the Eighth Amendment if Lockett is the law.

II. The Booth Issue

The nature of the victim-impact evidence presented by the prosecution at the sentencing stage of this case self-evidently brings the case within Booth v. Maryland, ___ U.S. ___, 96 L.Ed.2d 440 (1987), and refutes the Court of Appeals' attempted distinction of Booth.[6] We

---

[6] State's Exhibit 1, a summary of an interview with the brother and sister-in-law of the homicide victim, appears at J.A. 85-86.

address the issue only to call to the Court's attention that the admission of this evidence violated not merely Booth but the basic Due Process principle invoked by the concurring Justices in Skipper v. South Carolina, ___ U.S. ___, 90 L.Ed.2d 1, 10-11 (1986): that a capital defendant must be "permitted to 'deny or explain' evidence on which his death sentence may, in part, have rested" (quoting Gardner v. Florida, 430 U.S. 349, 362 (1977)).

One of the disputed issues at the guilt phase of Ralph Mills' trial was whether the homicide of Paul Brown was the result of any provocation of Mills by Brown. See T. 495-496, 500-501.[7] In this connection, Mills attempted to present

---

7 "T." refers to the transcript of the trial and is used for references to material not contained in the parties' joint appendix.

evidence of Brown's apparent reputation for violence, which was excluded by rulings of the trial court. T. 443. Yet at sentencing, the prosecutor put in victim-impact evidence which portrayed Brown as "a good person who had a tough life, a lot of bad breaks, ... nobody to really give him a chance," and specifically asserted that "he wasn't violent" (J.A. 85). The prosecutor then urged that the unprovoked and cold-blooded nature of the killing warranted a death sentence. (J.A. 86). Like Skipper's jury, Mills' jury was permitted to hear only one side of the story, and the prosecutor then took advantage of that lopsided state of the record to argue for death.

III. Conclusion

Mills' death sentence should be reversed.

Dated: January 21, 1988.

Respectfully submitted,

JULIUS L. CHAMBERS
RICHARD H. BURR III
* DEBORAH FINS
99 Hudson Street, 16th Floor
New York, New York 10013
(212) 219-1900

ANTHONY G. AMSTERDAM
New York University
School of Law
40 Washington Square South
Room 327
New York, New York 10012
(212) 998-6199

Attorneys for Amicus Curiae

By:_____
Deborah Fins

* Counsel of Record